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### Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law. I would like to thank Professor Marc Arkin for her insight and guidance.

# INTERPRETING CONGRESSIONAL SILENCE: CAFA'S JURISDICTIONAL BURDEN OF PROOF IN POST-REMOVAL REMAND PROCEEDINGS

*Jeffrey L. Roether\**

## INTRODUCTION

According to the Senate Judiciary Committee, abuses of the class action device by aggressive lawyers and lenient state judges have “undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution.”<sup>1</sup> In response, Congress passed the Class Action Fairness Act of 2005 (CAFA) in a stated attempt to reestablish the “fair and prompt” resolution of class actions.<sup>2</sup> CAFA attempted to achieve this end by broadening the federal judiciary’s ability to hear large class actions, making significant modifications to both statutory law and judge-made federal precedent on subject matter jurisdiction and removal.<sup>3</sup>

Soon after CAFA’s February 2005 enactment, many district courts found that CAFA had the potential to alter more than its text explicitly provided. CAFA did not contain a statutory provision that disturbed the long-standing rule that a party attempting to remove a state action to federal court bears the burden of establishing federal subject matter jurisdiction. However, portions of the Senate Judiciary Committee’s Report and the House Sponsor’s Statement explicitly express the intent to change the common law rule and instead require an objecting plaintiff to demonstrate that applicable jurisdictional requirements are unfulfilled.<sup>4</sup>

This Note concludes that the congressional statements did not shift the burden of establishing diversity jurisdiction to class plaintiffs as part of CAFA’s effort to favor federal jurisdiction. This Note argues that a court

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1. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 5 (to be codified in scattered sections of 28 U.S.C.).

2. *See id.* § 2(b) (“The purposes of this Act are to—(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.”).

3. *See infra* Part I.B.2.

4. *See infra* Part I.B.2.d.

hearing this issue should follow the U.S. Supreme Court's guidance in *Shannon v. United States*<sup>5</sup> and refuse to treat as binding authority statements within a statute's legislative history that are not linked to specific enacted text.<sup>6</sup> A contrary result would be a precedent allowing interested parties to undermine the lawmaking process by surreptitiously inserting statements into a bill's legislative history to manipulate statutory interpretation by the judiciary.<sup>7</sup> In addition, this Note argues that in the interests of judicial efficiency the burden of proof should remain on the proponent of the federal forum.<sup>8</sup>

Part I of this Note discusses the background rules governing subject matter jurisdiction and removal prior to the Class Action Fairness Act. It then examines the changes that CAFA made to class action litigation with particular attention toward federal subject matter and removal jurisdiction. Part I also discusses the different theories regarding the proper use of legislative history in statutory interpretation. Part II reviews federal court opinions that have decided the issue of which party bears the risk of non-persuasion in a remand action after removal. Part III advocates for the continued use of the traditional rule despite evidence in the legislative history of the Judiciary Committee's intent to the contrary.

#### I. THE SCOPE OF CAFA'S MODIFICATIONS OF CLASS ACTION PROCEDURE

This part provides the necessary background information to understand the disagreement over which party should bear the burden of proving CAFA's diversity requirements on a motion to remand after removal. Part I.A introduces the law pertinent to diversity jurisdiction of class actions prior to CAFA's enactment, including removal and the burden of proof. Part I.B examines CAFA's impact on class action procedure in response to the congressional finding of widespread abuse of class actions in state courts. Part I.C compares the subjective and objective theories of statutory interpretation and concludes with an analysis of the Supreme Court's recent treatment of legislative history in the interpretive process.

##### A. *Jurisdiction over Class Actions Prior to CAFA*

The following subsections focus on the federal judiciary's ability to hear class actions prior to CAFA's enactment. Part I.A.1 introduces basic principles of federal diversity jurisdiction. Part I.A.2 describes the procedure governing the removal of diversity actions. Part I.A.3 summarizes the traditional burden of proving subject matter jurisdiction.

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5. 512 U.S. 573 (1994).

6. See *infra* Part III.A.

7. See *infra* Part III.B.

8. See *infra* Part III.C.

### 1. Original Diversity Jurisdiction

It is "a fundamental tenet of American jurisprudence" that federal courts are courts of limited jurisdiction.<sup>9</sup> Federal courts may hear only cases within both the grant of Article III of the Constitution and a congressional statutory grant of jurisdiction.<sup>10</sup> For example, to provide a forum for plaintiffs who seek to vindicate federal rights, pursuant to Article III,<sup>11</sup> Congress conferred on the "district courts . . . original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."<sup>12</sup>

Congress has no duty to grant federal subject matter jurisdiction to the full limits authorized by Article III, but is free to "establish priorities for the allocation of judicial resources" and leave some controversies to the states.<sup>13</sup> For example, in the Judiciary Act of 1789, Congress created diversity jurisdiction pursuant to the constitutional grant of federal judicial power over "[c]ontroversies . . . between [c]itizens of different [s]tates."<sup>14</sup> However, Congress did not authorize federal jurisdiction over all controversies between citizens of different states. Instead, to prevent a flood of minor disputes from entering the federal forum, it limited the reach of federal courts with a \$500 minimum amount in controversy requirement.<sup>15</sup> Moreover, in 1806, the Supreme Court further limited diversity jurisdiction in *Strawbridge v. Curtiss*, interpreting the Federal

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9. *Verlinden B.V. v. Cent. Bank of Nigeria*, 647 F.2d 320, 321 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

10. See *Delaware v. Van Arsdaal*, 475 U.S. 673, 692 (1986) ("In origin and design, federal courts are courts of limited jurisdiction; they exercise only the authority conferred on them by Art. III and by congressional enactments pursuant thereto."); *In re Morrissey*, 717 F.2d 100, 102 (3d Cir. 1983) ("United States district courts are courts of limited jurisdiction and Congress, as allowed by the Constitution, must expressly grant them the power and authority to hear and decide cases."); see also 13 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3522 (2d ed. 1984).

11. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .").

12. 28 U.S.C. § 1331 (2000).

13. *Carlson v. Green*, 446 U.S. 14, 36 (1980); see *Sheldon v. Sill*, 49 U.S. (8 How.) 440, 449 (1850) ("The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress; and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant." (internal quotation marks omitted)).

14. U.S. Const. art. III, § 2, cl. 1; see Judiciary Act of 1789, ch 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332 (2000)) (granting diversity jurisdiction to the Article III courts).

15. See Judiciary Act of 1789 § 11 ("[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.").

Judiciary Act of 1789 to require complete diversity of citizenship between the parties.<sup>16</sup>

Numerous congressional amendments have changed the scope of federal diversity jurisdiction over time.<sup>17</sup> Section 1332(a) of 28 U.S.C. currently grants federal district courts original jurisdiction over any civil action (including class actions) in which the parties are completely diverse<sup>18</sup> and the amount in controversy exceeds \$75,000.<sup>19</sup> The diversity statute does not differentiate class actions from other civil actions; instead the federal judiciary developed rules to apply the relatively simple requirements of section 1332 to the more complex structure of a class action. For class actions pled under section 1332, the citizenship of putative class members is ignored; only the named plaintiffs are considered in assessing the complete diversity requirement.<sup>20</sup> Moreover, prior to 2005, each class member (not merely the class representatives) was required to satisfy independently the \$75,000 amount in controversy.<sup>21</sup>

## 2. Removal Jurisdiction in Diversity Actions

The plaintiff is the master of her complaint and can therefore file her case in state court without giving any thought to whether the case could satisfy

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16. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). The U.S. Supreme Court has long interpreted this to require "complete diversity," meaning that all plaintiffs must be citizens of different states than all defendants. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967) ("[The Supreme] Court held that the diversity of citizenship statute required 'complete diversity': where co-citizens appeared on both sides of a dispute, jurisdiction was lost.").

17. 13B Wright, Miller & Cooper, *supra* note 10, § 3601 (discussing congressional amendments to diversity jurisdiction).

18. Section 1332 creates diversity jurisdiction over cases between citizens of different states or between citizens of a state of the United States and a citizen of a foreign state. 28 U.S.C. § 1332(a)(1)-(2) (2000).

19. *See id.* § 1332(a).

20. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969) ("[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State.").

21. *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 301 (1973). Prior to 2005, circuit courts had been split over whether 28 U.S.C. § 1367(a) overruled *Zahn* by granting supplemental jurisdiction over claims that are part of the same case or controversy. *Compare Rosmer v. Pfizer Inc.*, 263 F.3d 110, 114 (4th Cir. 2001) (holding that supplemental jurisdiction overruled *Zahn* and applies to diversity class actions), *with Trimble v. Asarco, Inc.*, 232 F.3d 946, 961-62 (8th Cir. 2000) (holding that all putative class members must individually satisfy the federal amount in controversy). However, several months after the enactment of the Class Action Fairness Act of 2005 (CAFA), the Supreme Court resolved the split and held that § 1367 overruled *Zahn* and confers federal jurisdiction over additional plaintiffs who fail to satisfy the minimum amount-in-controversy requirement, as long as "the other elements of jurisdiction are present and at least one named plaintiff in the action satisfies the amount-in-controversy requirement." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005).

federal diversity jurisdiction.<sup>22</sup> The defendant has no constitutional right to remove a case to federal court,<sup>23</sup> but Congress has authorized removal under certain situations. Class actions pled under section 1332, like other civil actions, can be removed from state court via 28 U.S.C. §§ 1441, 1446, and 1447. These provisions permit defendants to remove most civil actions meeting the diversity requirements originally brought in state court.<sup>24</sup>

However, due to several exceptions to the removal statutes,<sup>25</sup> “diversity jurisdiction in removal cases [is] narrower than if the case were originally filed in federal court by the plaintiff.”<sup>26</sup> For instance, removal of a diversity jurisdiction action is unavailable if any defendant “is a citizen of the State in which [the] action is brought.”<sup>27</sup> In addition, a multi-defendant case can be removed to federal court only if all defendants consent to removal.<sup>28</sup> Furthermore, unlike cases removable under federal question jurisdiction, diversity actions cannot be removed to a district court more than one year after their commencement in state court.<sup>29</sup>

### 3. The Burden of Establishing Subject Matter Jurisdiction

Whether a civil action is filed in federal court in the first instance or arrives by removal, federal courts are under a constant duty to respect the powers reserved to the states by refusing to adjudicate cases outside of the jurisdictional bounds established by Congress.<sup>30</sup> To help fulfill that duty,

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22. *Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1145 (8th Cir. 1992) (noting that the plaintiff had the right to file in state court even though the diversity requirements were fulfilled).

23. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816) (noting that the “power of removal is not to be found in express terms in any part of the constitution” and therefore it is subject to complete legislative control).

24. *See* 28 U.S.C. § 1441(b) (2000). Removal procedure is governed by 28 U.S.C. §§ 1446 and 1447.

25. *See, e.g.*, 28 U.S.C. § 1445(c) (creating the workmen's compensation exception); § 1446(b) (creating a one-year limit on removal of diversity actions).

26. *Hurt*, 963 F.2d at 1145; *see also* *Ziegler v. Champion Mortgage Co.*, 913 F.2d 228, 230 (5th Cir. 1990) (“Substantively, the scope of removal jurisdiction can be narrower than that of subject matter jurisdiction.”).

27. 28 U.S.C. § 1441(b).

28. *See* *Chicago, Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900) (requiring the consent of all defendants to remove); *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 201 (6th Cir. 2004) (“The rule of unanimity requires that in order for a notice of removal to be properly before the court, all defendants who have been served or otherwise properly joined in the action must either join in the removal, or file a written consent to the removal.” (internal quotation marks omitted)).

29. 28 U.S.C. § 1446(b). Generally, a notice of removal must be filed in the district court within thirty days of service of the initial state pleadings. *Id.* However, if the case is not removable at the time of the initial state court pleading, all cases (except those conferring jurisdiction under section 1332) may be removed within thirty days of the date of the event that made the case removable. *Id.*

30. *See* 13 Wright, Miller, & Cooper, *supra* note 10, § 3522. Even if the parties do not dispute the existence of subject matter jurisdiction, federal trial and appellate courts are bound to find the lack of their own (or the lower court's) subject matter jurisdiction on their own motion. *See* *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1244 (2006) (“[A]ll federal

courts have established procedures to ensure that a case falls properly within their subject matter jurisdiction. For example, a federal court must always presume that subject matter jurisdiction is lacking until the contrary is affirmatively demonstrated.<sup>31</sup> In the complaint, the plaintiff must plead facts showing the existence of subject matter jurisdiction.<sup>32</sup> Moreover, if the jurisdictional facts in the complaint are disputed, the Supreme Court has placed the burden on the plaintiff seeking to invoke the power of the federal court to demonstrate the existence of subject matter jurisdiction.<sup>33</sup>

Courts have developed similar rules when a party attempts to remove a case from state court. If removal is contested, the removing party, who in this case is the defendant, carries the initial burden of establishing subject matter jurisdiction since it is the one seeking federal court power.<sup>34</sup> If the removing party successfully establishes that the federal court had original jurisdiction over the plaintiff's claim, then the burden of proof shifts to the proponent of remand to show that the claim falls under an express statutory exception to removal.<sup>35</sup>

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courts] have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."); *Pac. Towboat & Salvage Co. v. Interstate Commerce Comm'n*, 620 F.2d 727, 729 (9th Cir. 1980) (noting that "jurisdiction . . . under Article III is always open to inquiry upon the court's own motion").

31. *See Grace v. Am. Cent. Ins. Co.*, 109 U.S. 278, 283 (1883) ("As the jurisdiction of the circuit court is limited . . . the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears."); *Memphis Am. Fed'n of Teachers, Local 2032 v. Bd. of Educ. of Memphis City Schools*, 534 F.2d 699, 701 (6th Cir. 1976) ("It was inappropriate for the District Court to assume the existence of jurisdiction and then to proceed to decide the merits of this case. Without a finding that there is federal jurisdiction over a particular claim for relief the federal courts are without power to proceed.").

32. *See Fed. R. Civ. P. 8(a)* ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it . . ."); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182, 189 (1936) ("It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case. . . . He must allege in his pleading the facts essential to show jurisdiction.").

33. *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942) ("[I]f a plaintiff's allegations of jurisdictional facts are challenged by the defendant, the plaintiff bears the burden of supporting the allegations by competent proof."); *McNutt*, 298 U.S. at 189 ("If [the plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.").

34. *See Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) ("[T]he petitioning defendant must take and carry the burden of proof, he being the actor in the removal proceeding."); *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001) ("Because this case was originally filed in state court and removed to federal court by [the defendant], [the defendant] bears the burden of proving that federal jurisdiction exists."); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) ("The 'strong presumption' against removal jurisdiction means that the defendant always has the burden of establishing that removal is proper.").

35. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003) ("[W]henver the subject matter of an action qualifies it for removal, the burden is on a plaintiff to find an express exception.").



The removal statutes have been strictly construed, with all doubts over jurisdictional requirements being resolved in favor of remand.<sup>36</sup> Strict construction is necessary because “defendant’s use of that statute deprives a state court of a case properly before it and thereby implicates important federalism concerns.”<sup>37</sup> Federal courts have recognized their role as limited tribunals and have taken caution only to allow removal in cases explicitly authorized by a statutory grant of Congress.<sup>38</sup>

### B. *Perceived Class Action Abuses Created a Demand for Reform*

The class action device traditionally has served as a tool of efficiency. It can spare courts the burden of hearing hundreds of duplicative cases while also providing recourse for plaintiffs whose claims would not otherwise be economically feasible.<sup>39</sup> However, the class action has also become an efficient tool of entrepreneurial plaintiffs’ lawyers because by the mere fact of aggregation it creates an opportunity to earn higher fees than other actions without the same level of work that the equivalent number of individual actions would require.<sup>40</sup> Therefore, especially in state courts, judges have found a striking increase of class action disputes on their dockets; during the period of 1988 to 1998, class action filings against Fortune 500 companies increased by more than 300% in federal courts and by more than 1000% in state courts.<sup>41</sup>

Following the rapid growth of class actions, the United States Chamber of Commerce and numerous legal commentators sought reform to a system

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36. See, e.g., *Syngenta Crop. Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (“[S]tatutory procedures for removal are to be strictly construed.”); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (“[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of [the removal statute].”).

37. *Frank v. Bear Stearns & Co.*, 128 F.3d 919, 922 (5th Cir. 1997); see also *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005) (discussing their “obligation to construe removal jurisdiction strictly because of the significant federalism concerns implicated by it” (internal quotation marks omitted)).

38. See *Shamrock Oil*, 313 U.S. at 109 (“Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.” (internal quotation marks omitted)); *Pritchett v. Office Depot, Inc.* 420 F.3d 1090, 1094-95 (10th Cir. 2005) (“It is well-established that . . . removal statutes . . . are to be narrowly construed in light of our constitutional role as limited tribunals.”).

39. See 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* 1-1 (3d ed. 2006); Stuart T. Rossman & Charles Delbaum, *Consumer Class Actions* 3-6 (6th ed. 2006).

40. See Rossman & Delbaum, *supra* note 39, at 4 (“Attorney fees may be significantly higher in a class action than in an individual action, even if the amount of attorney time is equivalent.”).

41. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 13 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 14; Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483, 488 (2000).

that they believed was riddled with abuse.<sup>42</sup> These commentators attributed much of the abuse to state courts, and therefore they argued that Congress should broaden diversity jurisdiction over class actions to “provide a fairer and more impartial federal court forum for interstate class actions.”<sup>43</sup> Many politicians resisted, arguing that the real motivation for class action reform was to appease big business lobbyists by cutting corporate litigation costs at tort victims’ expense.<sup>44</sup> These opponents of tort reform believed that federal courts are generally less receptive to class actions and apply the certification rules stringently.<sup>45</sup> Therefore, the federalization of class actions would substantially reduce the plaintiff’s probability of prevailing on a motion for class certification, which would likely prevent many with viable claims from filing individual actions.<sup>46</sup> Whether its real motivation was to correct class action abuses or simply to reduce corporate legal liability, Congress took notice. It passed CAFA in February 2005 in an attempt to assure fair adjudication of class actions and to modify the diversity rules governing class actions to match the intent of the framers of the Constitution.<sup>47</sup> CAFA took action in four areas—it broadened federal jurisdiction over class actions, amended the rules involving removal, expanded appeal opportunities, and increased judicial oversight of settlements.<sup>48</sup> Following CAFA’s enactment, the Senate Judiciary Committee released a report detailing the Act’s content and scope.<sup>49</sup> Part I.B.1 discusses the perceived class action abuses that Congress believed required reform.

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42. See, e.g., Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 218-19 (2004); American Tort Reform Foundation, *Judicial Hellholes 2004*, at 6-7 (2004), <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf> [hereinafter *Judicial Hellholes 2004*]; Schwartz, Behrens & Lorber, *supra* note 41, at 511-13.

43. Schwartz, Behrens & Lorber, *supra* note 41, at 510; see also Litwiller, *supra* note 42, at 215-18.

44. See 151 Cong. Rec. H723, H733, H737 (daily ed. Feb. 17, 2005) (statements of Rep. Markey and Rep. Inslee); see also John Conyers, Jr., *Class Action “Fairness”—A Bad Deal for the States and Consumers*, 40 Harv. J. on Legis. 493, 506-10 (2003); Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 51-76, as reprinted in 2005 U.S.C.C.A.N. at 48-71.

45. See Allison M. Gruenwald, Note, *Rethinking Place of Business as Choice of Law in Class Action Lawsuits*, 58 Vand. L. Rev. 1925, 1927-28 (2005).

46. See Conyers, *supra* note 44, at 506-09. Many potential class plaintiffs would proceed with individual actions after a court denies certification. However, absent the economic efficiencies of the class action device, many will choose not (or even realize their opportunity) to litigate their potential claim. See *supra* note 39 and accompanying text.

47. Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(b), 119 Stat. 4, 5 (to be codified in scattered sections of 28 U.S.C.) (“The purposes of this Act are to—(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.”).

48. See *id.* §§ 3-5.

49. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 4-5, as reprinted in 2005 U.S.C.C.A.N. at 5-6.

### 1. Congressional Findings

The Judiciary Committee's report outlined reasons why most plaintiffs' lawyers usually prefer to bring class actions in state court.<sup>50</sup> In most jurisdictions there is no advantage to be gained from state procedural rules per se because "the rules governing the decision whether cases may proceed as class actions are basically the same in federal and state courts."<sup>51</sup> Despite the statutory similarities, Congress found that plaintiffs' lawyers aggressively litigate class actions in state courts in part because of the state judges' lax application of procedural rules.<sup>52</sup> The Senate Judiciary Committee accused state judges of carelessly certifying non-meritorious class actions since they do not always "follow[] the strict requirements of Rule 23 (or the state's parallel governing rule), which are intended to protect the due process rights of both unnamed class members and defendants."<sup>53</sup> The Committee stated that some state court judges have certified class actions, "not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial."<sup>54</sup> Moreover, the Judiciary Committee believed that class plaintiffs' attorneys more often file in state court because of the weaker judicial scrutiny over proposed settlements. It reasoned that due to "the explosion of state court class actions" and a lack of resources compared with their federal counterparts,<sup>55</sup> state judges have been overwhelmed by their dockets.<sup>56</sup>

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50. See *id.* at 10-23, as reprinted in 2005 U.S.C.C.A.N. at 11-23; see also McLaughlin, *supra* note 39, at 2-3 ("From the defense perspective, there may be several advantages to litigating a class action in federal court, including: (i) controlling applicability of the more exacting requirements for class certification enunciated by federal courts; (ii) greater availability of interlocutory review of class certification rulings; (iii) greater ability to consolidate related litigation through 28 U.S.C.A. § 1404(a) transfers and the Multidistrict Litigation Panel; (iv) less restrictive use of summary judgment; and (v) access to jury pools outside the immediate locality of plaintiffs."). But see Rossman & Delbaum, *supra* note 39, at 25 (stating that federal court may often be favorable because some states have strict rules and less experience in handling large class actions).

51. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 13, as reprinted in 2005 U.S.C.C.A.N. at 14 (noting that "thirty-six states have adopted the basic federal class action rule (Rule 23)" and most others adopted "similar requirements"). However, state class action rules can vary considerably. For example, Mississippi does not permit class actions. See Robert H. Klonoff, *The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider*, 24 Miss. C. L. Rev. 261, 261 (2005). With this in mind, Congress created the mass action provision, 28 U.S.C. § 1332(d)(11), to remove large actions joined under common questions of law or fact, which the Judiciary Committee labeled "class actions in disguise." Judiciary Committee Report, *supra* note 41, at 47; see *infra* notes 128-33 and accompanying text.

52. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 14, as reprinted in 2005 U.S.C.C.A.N. at 14.

53. *Id.*, as reprinted in 2005 U.S.C.C.A.N. at 14.

54. *Id.* at 21, as reprinted in 2005 U.S.C.C.A.N. at 21.

55. *Id.* at 14, as reprinted in 2005 U.S.C.C.A.N. at 15 (noting that state judges face heavier dockets and lack the resources—including law clerks and magistrate judges—to devote enough time to properly assess class action settlements).

56. *Id.*, as reprinted in 2005 U.S.C.C.A.N. at 15.

With less time at their disposal, state judges are more likely to approve unfair settlements with massive fee awards.<sup>57</sup>

The Senate Judiciary Committee believed that these state court judges enabled a system of “judicial blackmail.”<sup>58</sup> A proponent of tort reform has observed that attorneys often file class actions in state court simply to create a risk of a massive verdict and to “put[] enormous pressure on corporate executives to settle even the flimsiest of cases in order to appease anxious shareholders.”<sup>59</sup> Similarly, the Judiciary Committee found that the potential liability of losing a “nationwide” class action has put corporate defendants at the mercy of class action attorneys: “[B]asic economics” compels corporations to settle even when the claims are so meritless that there is “only a five percent chance of success.”<sup>60</sup> The Committee found that attorneys have taken advantage of that leverage for their own personal gain, creating settlements that bestow a windfall on the attorneys without providing meaningful compensation to class members.<sup>61</sup>

The Committee believed that federal courts are the proper forums for multistate class actions since these cases “usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy.”<sup>62</sup> Consequently, it believed that sweeping more class actions into federal courts would alleviate the abuses that were undermining the rights of class action defendants and adversely affecting national commerce.<sup>63</sup> It sought to amend the rules governing diversity jurisdiction and removal of class actions to reach that end.

Congress blamed the outdated diversity requirements for keeping many large class actions out of federal courts.<sup>64</sup> The Senate Judiciary Committee stated that these “class actions . . . involve millions of parties from numerous states [and therefore] present the precise concerns that diversity jurisdiction was designed to prevent.”<sup>65</sup> However, class actions did not exist when diversity jurisdiction was created by the First Judiciary Act of 1789.<sup>66</sup> Since the diversity rules predate class actions, the Committee

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57. *See id.*, as reprinted in 2005 U.S.C.C.A.N. at 15.

58. *Id.* at 20-21, as reprinted in 2005 U.S.C.C.A.N. at 21-22.

59. Schwartz, Behrens & Lorber, *supra* note 41, at 484.

60. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 21, as reprinted in 2005 U.S.C.C.A.N. at 21.

61. *Id.* at 14-20, as reprinted in 2005 U.S.C.C.A.N. at 15-20 (discussing class action settlements including a settlement, approved by an Alabama state court, in which each class member received \$8.76 and class counsel received \$8.5 million in fees).

62. *Id.* at 27, as reprinted in 2005 U.S.C.C.A.N. at 27.

63. *See id.*, as reprinted in 2005 U.S.C.C.A.N. at 27.

64. *See id.* at 6, 10-12, as reprinted in 2005 U.S.C.C.A.N. at 7, 11-13. The report cites numerous federal opinions that call for revision of the diversity requirements governing class actions, including *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 798 (11th Cir. 1999) (Nangle, J., concurring), which labeled the strict compliance to the diversity rules as “antiquated, out-of-date judicial theories.”

65. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 6, as reprinted in 2005 U.S.C.C.A.N. at 7.

66. *See id.*, as reprinted in 2005 U.S.C.C.A.N. at 7.

found that many class actions encompass the type of case that the founders thought deserved the protections of the federal forum, but are excluded from federal courts by the current statutory diversity scheme.<sup>67</sup> Therefore, the Judiciary Committee concluded that the diversity and removal rules do not relate properly to large class actions, and this “technical glitch” needed reform.<sup>68</sup>

Legislators were particularly critical of attorneys’ exploitation of diversity jurisdiction to “game” the procedural rules to prevent removal.<sup>69</sup> Plaintiffs’ attorneys often add nominal claims against in-state defendants (e.g., a local retailer or distributor) to claims against a national corporation for the sole purpose of defeating complete diversity.<sup>70</sup> After one year, the plaintiff’s counsel could then voluntarily dismiss the claim against the local party. The claim would then meet diversity, but removal would still be prohibited under Section 1446(b)’s non-waivable one-year time limit.<sup>71</sup> Even if the court dismisses the claim against the local defendant on a pretrial motion or motion for summary judgment, the dismissed party’s residency will continue to prevent removal absent a showing of “fraudulent joinder.”<sup>72</sup> Similarly, class action complaints often include provisions stating that no class member will seek more than \$75,000 in damages.<sup>73</sup> If accepted by the court as true, this provision would prevent removal without limiting potential damages because plaintiffs could amend their complaint as necessary after the one-year statutory deadline for removal to federal court.<sup>74</sup>

The Judiciary Committee seemingly ignored the steps federal courts can take to limit plaintiffs’ ability to avoid diversity jurisdiction. For example, “fraudulent joinder” litigation recently has drawn more attention in federal courts.<sup>75</sup> Under this doctrine, if the court determines that the party was

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67. *Id.* at 6, 10-12, as reprinted in 2005 U.S.C.C.A.N. at 7, 11-13. The report cited *Davis*, 182 F.3d at 797-98, which stated that the court is “bound” to “reject any policy-based arguments” for remand although “[o]ne would think that this case is exactly what those who espouse the historical justification for [diversity jurisdiction] would have had in mind.”

68. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 6, as reprinted in 2005 U.S.C.C.A.N. at 7.

69. *Id.* at 10, as reprinted in 2005 U.S.C.C.A.N. at 11.

70. *Id.*, as reprinted in 2005 U.S.C.C.A.N. at 11-12.

71. See *supra* note 29 and accompanying text; see also *Russaw v. Voyager Life Ins. Co.*, 921 F. Supp. 723, 725 (M.D. Ala. 1996) (refusing to extend the one-year limit on removal, even when a defendant was joined for the sole purpose of destroying diversity).

72. See *Whitcomb v. Smithson*, 175 U.S. 635, 637-38 (1900) (holding that a case does not become removable after the dismissal of a local defendant creates complete diversity among the remaining parties); see also James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 Alb. L. Rev. 1013, 1021-22 (2006) (discussing the voluntary/involuntary dismissal rule).

73. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 11, as reprinted in 2005 U.S.C.C.A.N. at 12.

74. See *id.*, as reprinted in 2005 U.S.C.C.A.N. at 12.; *supra* note 29 and accompanying text.

75. See E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 Iowa L. Rev. 189, 191-92 (2005).

joined solely to defeat jurisdiction, it is permitted to disregard the party for diversity purposes.<sup>76</sup> In addition, several federal courts have found removal proper despite plaintiffs' contentions that the amount in controversy would not exceed the jurisdictional requirement.<sup>77</sup>

Nevertheless, plaintiffs' attorneys seem adept at bringing (and keeping) class actions in state courts that are particularly "class action friendly." Proponents of tort reform have labeled certain jurisdictions "magnet courts" because of their overwhelming bias against class action defendants. For example, the American Tort Reform Association has dubbed Madison County, Illinois a "magnet court"—and a "judicial hellhole"—in part because of its state court judges' pro-plaintiff attitude and penchant for certifying any proposed class action to fall on their docket.<sup>78</sup> After a Madison County court certifies a class action, defendants most often seek to settle the claim because the "working-man" demographic of the area has created a reputation among trial lawyers for leading to equally pro-plaintiff jury pools.<sup>79</sup> Plaintiffs' lawyers have responded; the number of class actions filed in Madison County grew from two in 1998 to 106 in 2003,<sup>80</sup> most of which involve nationwide classes suing large multinational corporations.<sup>81</sup> In Madison County, a rural area with a population of less than 300,000,<sup>82</sup> class action litigation has become a business, with lawyers running

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76. See *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 302 (2d Cir. 2004) ("The doctrine of fraudulent joinder is meant to prevent plaintiffs from joining non-diverse parties in an effort to defeat federal jurisdiction."); *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) ("[A]lthough a plaintiff is normally free to choose its own forum, it may not join an in-state defendant solely for the purpose of defeating federal diversity jurisdiction."); see also *McLaughlin*, *supra* note 39, § 2-3.

77. See *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411 (5th Cir. 1995) ("[W]e hold that if a defendant can show that the amount in controversy actually exceeds the jurisdictional amount, the plaintiff must be able to show that, as a matter of law, it is certain that he will not be able to recover more than the damages for which he has prayed in the state court complaint. Such a rule is necessary to avoid the sort of manipulation that has occurred in the instant case."); *In re Norplant Contraceptive Prods. Liab. Litig.*, 918 F. Supp. 178, 180 (E.D. Tex. 1996) (standing for the same principle). *But see* *Kline v. Avis Rent a Car Sys., Inc.*, 66 F. Supp. 2d 1237, 1240 (S.D. Ala. 1999) (holding that "plaintiff is still master of her own claim . . . [and] the court will not consider . . . waived claims in determining whether the amount in controversy exceeds \$75,000" (internal quotation marks omitted)).

78. *Judicial Hellholes 2004*, *supra* note 42, at 14-18.

79. Christi Parsons, *Downstate County Is a 'Plaintiff's Paradise': Class Action Suits Rising Dramatically, Critics Complain*, Chi. Trib., June 17, 2002, § 1, at 1.

80. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 13 (2005), as reprinted in 2005 U.S.C.C.A.N. 3, 14. In the week prior to CAFA's enactment, when it became clear that it soon would be more difficult to keep a class action in state court, twenty class actions were filed in Madison County. Statement by President of the United States, 41 Weekly Comp. Pres. Doc. 265, 266 (Feb. 18, 2005), as reprinted in 2005 U.S.C.C.A.N. S3.

81. *Judicial Hellholes 2004*, *supra* note 42, at 15 (listing class actions filed in Madison County against corporations such as American Express, Sears Roebuck, Intel, and Ford).

82. Parsons, *supra* note 79.

advertisements in search of class representatives<sup>83</sup> and individual plaintiffs bringing multiple class actions in a single year.<sup>84</sup>

The Judiciary Committee believed that these state courts should not be hearing “nationwide class actions,” because it allows “one state court to dictate to 49 others what their laws should be on a particular issue, thereby undermining basic federalism principles.”<sup>85</sup> The Judiciary Committee went on to describe instances in which state courts—including Madison County—applied their own state law on a variety of issues in a nationwide class action.<sup>86</sup> This practice is not fundamentally unconstitutional considering that relevant state law does not always conflict from state to state.<sup>87</sup> However, the Committee believed “[t]he sentiment reflected in these cases flies in the face of basic federalism principles by embracing the view that other states should abide by a deciding court’s law whenever it decides that its own laws are preferable to other states’ contrary policy choices.”<sup>88</sup>

## 2. CAFA’s Enactment Alters the Class Action Landscape

Part I.B.2 of this Note discusses CAFA’s impact on class action litigation. Part I.B.2.a briefly introduces the “Consumer Class Action Bill of Rights” that increased regulation of class action settlements. More pertinent to the scope of this Note, Part I.B.2.b addresses how CAFA broadened diversity jurisdiction of class actions. Part I.B.2.c describes the new removal statute governing class actions, and Part I.B.2.d examines CAFA’s legislative history, which suggests a change to the burden of proving subject matter jurisdiction on a motion to remand after removal.

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83. *Id.*

84. See Judicial Hellholes 2004, *supra* note 42, at 15.

85. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 24, as reprinted in 2005 U.S.C.C.A.N. at 24.

86. *Id.*, as reprinted in 2005 U.S.C.C.A.N. at 24.

87. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816 (1985) (“There can be no injury in applying [forum] law if it is not in conflict with that of any other jurisdiction connected to this suit.”). In *Shutts*, the Court determined, however, that if forum law conflicts with the law of another relevant state, the court could apply the forum law to the entire nationwide class only if the state has “significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Id.* at 818. This choice-of-law standard is especially important due to its implications on class certification. Federal appellate courts have often decertified nationwide class actions when applying the law of each class member’s state of domicile would violate Rule 23(b)(3)’s predominance requirement. See, e.g., *Andrews v. AT&T Co.*, 95 F.3d 1014, 1023-24 (11th Cir. 1996); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740-43 (5th Cir. 1996).

88. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 26, as reprinted in 2005 U.S.C.C.A.N. at 26.

a. *CAFA Increases Judicial Regulation of Class Action Settlements*

Labeled by Congress as a “Consumer Class Action Bill of Rights,”<sup>89</sup> CAFA instituted four statutes intended to “address[] the problem of unfair settlements and excessive attorneys’ fees.”<sup>90</sup> These new rules are distinct from CAFA’s diversity and removal provisions; they apply to all federal class actions, regardless of which statute the parties invoked to satisfy subject matter jurisdiction.<sup>91</sup> First, 28 U.S.C. § 1712 requires increased scrutiny of coupon settlements, including regulation of the attorney’s fees arising from them.<sup>92</sup> The statute allows the court to approve a proposed coupon settlement, but only after “making a written finding that, the settlement is fair, reasonable, and adequate for class members.”<sup>93</sup> Second, 28 U.S.C. § 1713 allows the court to strike any settlement “that would result in a net loss to the class member.”<sup>94</sup> Third, Congress sought to forbid settlements that provide preferential payments to class members on the basis of the proximity of their residence to the courthouse and no other “legitimate legal basis.”<sup>95</sup> Therefore, Section 1714 prohibits courts from approving settlements that provide greater monetary relief to class members “solely on the basis . . . [of their] geographic proximity to the court.”<sup>96</sup>

CAFA also instituted a strict notice requirement applicable to all class action settlements. Under 28 U.S.C. § 1715, within ten days of the filing of a class action settlement, the defendant must provide a copy of the complaint, proposed settlement, and other applicable materials to the appropriate state and federal officials.<sup>97</sup> This provision was intended to “ensure that a responsible state and/or federal official . . . is in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies.”<sup>98</sup> The officials do not

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89. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3, 119 Stat. 4, 5-9 (to be codified in 28 U.S.C. §§ 1711-15).

90. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 27, *as reprinted in* 2005 U.S.C.C.A.N. at 27.

91. *See* 28 U.S.C.A. § 1711 (2006) (defining a “class action” as “any civil action filed in a district court of the United States under rule 23” or originally filed as a class action in a state court and subsequently removed to a United States district court).

92. *See id.* § 1712(a)-(c). Most notably, the contingent fee arising from a coupon settlement “shall be based on the value to class members of the coupons that are redeemed,” instead of the value of the coupons issued. *Id.* § 1712(a).

93. *Id.* § 1712(e).

94. *Id.* § 1713 (directing the court to strike a settlement involving a payment to class counsel that would result in a net loss unless “the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss”).

95. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 32, *as reprinted in* 2005 U.S.C.C.A.N. at 31.

96. 28 U.S.C.A. § 1714.

97. *See id.* § 1715(b).

98. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 32, *as reprinted in* 2005 U.S.C.C.A.N. at 32.



have an affirmative duty to respond,<sup>99</sup> but the court must provide the officials ninety days to object before it gives final approval of a proposed settlement.<sup>100</sup>

b. *CAFA Expands Federal Jurisdiction over Class Actions*

The key provision in Congress's effort to broaden the federal judiciary's ability to adjudicate large class actions was the addition of 28 U.S.C. § 1332(d). The statute expands diversity jurisdiction over a class action, broadly defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute."<sup>101</sup> Class plaintiffs can still attempt to invoke diversity jurisdiction under section 1332. However, as an alternative, federal subject matter jurisdiction now exists over class actions where (1) the proposed class has over 100 members; (2) the aggregated claims of class members exceed \$5,000,000 exclusive of costs and interest; and (3) any member of the class of plaintiffs is a citizen of a different state from any defendant.<sup>102</sup> This statute changed two long-standing rules that previously limited federal jurisdiction over class actions. CAFA adopted a "minimal diversity" standard, departing from the long-standing requirement of complete diversity between all named plaintiffs and defendants.<sup>103</sup> Also, in otherwise qualifying actions, CAFA overturned *Zahn v. International Paper Co.*, which required every class plaintiff individually to fulfill the requisite amount in controversy.<sup>104</sup>

At first glance, this new diversity statute seems to sweep most large class actions into federal court. However, CAFA also contains a number of exceptions that permit class actions with a strong state interest to remain in state court.<sup>105</sup> CAFA does not extend jurisdiction to any class action in

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99. See *id.* at 28 ("Nothing in this section creates an affirmative duty for either the state or federal officials to take any action in response to a class action settlement.").

100. 28 U.S.C.A. § 1715(d).

101. *Id.* § 1332(d)(1)(B).

102. See *id.* § 1332(d)(2)-(5); see also *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 679 (7th Cir. 2006); *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006).

103. See *Hart*, 457 F.3d at 676-77 (discussing CAFA's minimal diversity standard); Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1593, 1595-96 (2006) (describing CAFA's diversity statute as a "minimal diversity standard" because it requires only a single class member to reside in a different state from that of any defendant); *supra* notes 16, 18 and accompanying text.

104. After the enactment of CAFA, the Supreme Court held, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, that a plaintiff who fails to satisfy the minimum amount in controversy can establish jurisdiction under 28 U.S.C. § 1367 where the other elements of diversity jurisdiction are present and at least one named plaintiff satisfies the amount-in-controversy requirement. See *supra* note 21 and accompanying text. This change in common law is often inconsequential for class action litigation because of the new diversity requirements imposed by CAFA, but is an important change for class actions that cannot confer jurisdiction under CAFA, yet fulfill the traditional diversity requirements under § 1332(a).

105. *Hart*, 457 F.3d at 677 ("Congress decided to qualify this rule of minimal diversity, however, for class actions that were essentially local in nature."). Additionally, CAFA

which “the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.”<sup>106</sup>

In addition, CAFA does not grant diversity jurisdiction to actions in which more than two-thirds of the proposed class members and all “primary defendants”<sup>107</sup> are “citizens of the State in which the class action was originally filed.”<sup>108</sup> Dubbed the “home state exception,”<sup>109</sup> this provision allows state courts to decide issues between local parties in which “local interests . . . presumably would predominate.”<sup>110</sup> CAFA created a similar carve-out that provides the district court discretion whether to hear the case. If the “primary defendants” are citizens of the state in which the action was brought and the number of in-state class members only amounts to between one-third and two-thirds of the entire class, then diversity jurisdiction exists, but the district court *may* decline to exercise that jurisdiction in the interest of justice.<sup>111</sup> In this event, the statute directs the district court to “look[] at the totality of the circumstances” to determine whether the action is predominately local in character.<sup>112</sup>

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excludes class actions solely involving securities or state-law corporate governance claims because these cases already have distinct diversity requirements under the Securities Litigation Uniform Standards Act of 1998. 28 U.S.C.A. § 1332(d)(9); *see* Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 45 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 42; *see also* *Williams v. Tex. Commerce Trust Co. of N.Y.*, No. 05-1070-CV, 2006 WL 1696681, at \*4 (W.D. Mo. Jun. 15, 2006) (finding that the court “does not have jurisdiction under the CAFA over the multiple state law claims asserted by the Plaintiffs, all of which arise out of the rights, duties (including fiduciary duties) and obligations owed the Plaintiffs by the Defendants” (internal quotation marks omitted)).

106. 28 U.S.C.A. § 1332(d)(5)(A). This provision prevents government agents from removing a case to federal court and then arguing that the Eleventh Amendment prohibits the court from granting relief. *See* Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 42, *as reprinted in* 2005 U.S.C.C.A.N. at 40; Sarah S. Vance, *A Primer on the Class Action Fairness Act of 2005*, 80 Tul. L. Rev. 1617, 1621 (2006).

107. The statute does not define the term “primary defendants.” However, the Senate Judiciary Committee considered “primary defendants” to be “those defendants who are the real ‘targets’ of the lawsuit . . . [and have] substantial exposure to significant portions of the proposed class.” Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 43, *as reprinted in* 2005 U.S.C.C.A.N. at 41; *cf.* *Kearns v. Ford Motor Co.*, No. CV 05-5644, 2005 WL 3967998, at \*8 (C.D. Cal. Nov. 21, 2005) (defining “primary defendant” as “any [defendant] with direct liability to the plaintiffs”).

108. 28 U.S.C.A. § 1332(d)(4)(B).

109. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 28, *as reprinted in* 2005 U.S.C.C.A.N. at 28.

110. *Id.* at 36, *as reprinted in* 2005 U.S.C.C.A.N. at 35.

111. 28 U.S.C.A. § 1332(d)(3).

112. *Id.*; *see also* Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 36, *as reprinted in* 2005 U.S.C.C.A.N. at 35. The statute provides six factors to guide the court’s decision: (1) whether the claims involve matters of national interest; (2) whether the claims will be governed by the law of the forum state; (3) whether the action was pleaded “in a manner that seeks to avoid [f]ederal jurisdiction”; (4) whether the forum has a “distinct nexus with the class members, the alleged harm, or the defendants”; (5) whether the number of in-state class members is substantially larger than number of class members from any other state; and (6) whether another class action “asserting the same or similar claims” has been filed within the last three years. 28 U.S.C.A. § 1332(d)(3)(A)-(F).

CAFA also contains a "local controversy exception," which forces the district court to decline jurisdiction under similar circumstances.<sup>113</sup> This carve-out allows state courts to adjudicate many local controversies that would otherwise fall under the "home state exception," but contain at least one out-of-state defendant.<sup>114</sup> The proposed class action must fulfill four requirements to fall within this exception: (1) Greater than two-thirds of the class members are citizens of the state in which the action was originally brought; (2) at least one defendant from which "significant relief is sought" and "whose alleged conduct forms a significant basis" for the asserted claims is a citizen of the state in which the action was brought; (3) the "principal injuries resulting from the alleged conduct or any related conduct of each defendant" occurred in the forum state; and (4) no other class action involving similar factual allegations was filed against any of the same defendants in the past three years.<sup>115</sup>

### c. CAFA Modifies Removal

By broadening federal jurisdiction over class actions, CAFA naturally expanded a class action defendant's opportunities to remove a state class action to federal court. Additionally, CAFA eliminated several long-standing barriers to removal through the creation of a new removal statute, 28 U.S.C. § 1453.

First, Congress sought to prevent plaintiffs from including claims against an in-state defendant for the sole purpose of avoiding removal.<sup>116</sup> Therefore, CAFA now allows the removal of a class action "in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought."<sup>117</sup>

Second, CAFA allows the removal of a class action "without the consent of all defendants."<sup>118</sup> This provision prevents plaintiffs from "join[ing] a defendant who might be willing to break with other defendants as to removal, or negotiat[ing] favorably with a defendant who would oppose removal."<sup>119</sup>

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113. See 28 U.S.C.A. § 1332(d)(4)(A); Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 28, *as reprinted in* 2005 U.S.C.C.A.N. at 28 (creating the term "Local Controversy Exception").

114. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 28-29, *as reprinted in* 2005 U.S.C.C.A.N. at 28.

115. 28 U.S.C.A. § 1332(d)(4)(A); *see* Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 679 (7th Cir. 2006).

116. See *supra* notes 69-74 and accompanying text.

117. 28 U.S.C.A. § 1453(b); *see* Prime Care of N.E. Kan., LLC v. Humana Ins. Co., 447 F.3d 1284, 1284 (10th Cir. 2006).

118. 28 U.S.C.A. § 1453(b); *see* Braud v. Transp. Serv. Co. of Ill., 445 F.3d 801, 808 (5th Cir. 2006).

119. Sherman, *supra* note 103, at 1604.

Third, CAFA eliminated the prohibition on removal of a diversity class action to federal court more than one year after the action commenced.<sup>120</sup> Under CAFA, removal is available at any stage of the case, as long as notice is filed within thirty days from the date the case became removable.<sup>121</sup> Since the statute directs the judge only to look at the diversity requirements at the time of removal, defendants could presumably remove after a pretrial motion that dismisses a portion of the class and reduces the number of in-state plaintiffs to the point which the “home-state exception” no longer applies.<sup>122</sup>

Historically the grant of a motion to remand a case back to the state court from which it was removed could not be appealed.<sup>123</sup> However, CAFA’s removal statute allows discretionary, interlocutory appellate review by the Court of Appeals.<sup>124</sup> The statute imposes tight deadlines for review to prevent a lengthy delay in the case.<sup>125</sup> An appeal must be filed within seven days of the district court’s order on the motion to remand.<sup>126</sup> In addition, if the court of appeals decides to take the appeal, it must render a decision within sixty days of the date on which the appeal was filed.<sup>127</sup>

CAFA also contains a statutory provision that does not involve traditional class actions: The Act gives a district court removal jurisdiction over large actions that were filed jointly in a state court under a common question of law or fact. Section 1332(d)(11)(B) defines a “mass action” as “any civil action[] in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims

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120. 28 U.S.C.A. § 1453(b); see *Braud*, 445 F.3d at 806; *supra* note 29 and accompanying text.

121. 28 U.S.C. § 1446(b) (2000) (“If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . .”).

122. See *McLaughlin*, *supra* note 39, at 12-28.

123. See 28 U.S.C. § 1447(d) (“An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except [for civil rights cases removed under section 1443].”).

124. 28 U.S.C.A. § 1453(c).

125. *Sherman*, *supra* note 103, at 1605.

126. 28 U.S.C.A. § 1453(c)(1). Section 1453(c)(1) states that that the appeal must be made “not less than 7 days after entry of the order.” If applied literally, an appeal could be dismissed for being filed too early, but there would be no deadline to appeal after the seven days has passed. Courts have assumed that the statute contains a typographical error and held that the statute should be read to require an application of appeal to be made no *more* than seven days after entry of the order. See, e.g., *Morgan v. Gay*, 466 F.3d 276, 279 (3d Cir. 2006) (reading the statute as “not more than” because that “accurately reflects the *uncontested* intent of Congress”); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1146 (9th Cir. 2006) (same); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n.2 (10th Cir. 2005) (same).

127. 28 U.S.C.A. § 1453(c)(2). The 60-day period for judgment may be extended for up to 10 days for good cause, or for any period of time if agreed upon by all parties. *Id.* § 1453(c)(3).

involve common questions of law or fact.”<sup>128</sup> This type of action is deemed removable under CAFA if it fulfills CAFA’s diversity requirements set forth in section 1332(d)(2)-(10).<sup>129</sup> However, the statute also ties mass actions to the traditional amount in controversy, providing that “jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332(a)].”<sup>130</sup>

The clumsy drafting of the statute has many questioning the scope of the mass action provision.<sup>131</sup> Since the mass action statute intermingles the new diversity statute under CAFA and the traditional diversity requirements of section 1332(a), strange situations could potentially arise. For example, an action with hundreds of plaintiffs could be removed with only a handful of plaintiffs that independently fulfill section 1332(a), leaving a “mass action” in federal court with little mass.<sup>132</sup> With little insight from federal courts, it is unclear how this provision will operate in future cases.<sup>133</sup>

#### d. *Legislative History Points to a New Standard for the Burden of Proof*

CAFA’s text does not address which party bears the burden of establishing federal jurisdiction when a qualifying class action or mass action is removed to federal court. Placing the burden of proving CAFA’s diversity requirements on the plaintiff during a motion to remand would be consistent with CAFA’s intent to broaden diversity jurisdiction. Under that burden allocation, when the class size or amount in controversy is ambiguous, a class action would remain in federal court unless plaintiffs could make an affirmative showing that removal was improper. Despite the facial silence of the statute and the near-canonical common law rule that the party seeking removal bears the burden of proof on the issue of federal jurisdiction, two pieces of CAFA’s legislative history assert that the Act was intended to place the burden on the party resisting removal.

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128. *Id.* § 1332(d)(11)(B)(i).

129. *Id.* § 1332(d)(11)(A).

130. *Id.* § 1332(d)(11)(B)(i).

131. See Linda S. Mullenix, *CAFA Mass Actions*, Nat’l L.J., May 1, 2006, at 12.

132. *Id.* It is unclear how a court would handle this hypothetical situation if the aggregate of the remaining plaintiffs’ claims fell short of CAFA’s requirement of at least 100 plaintiffs and \$5,000,000 in controversy.

133. In *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006), the U.S. Court of Appeals for the Ninth Circuit was the first appellate court to address the mass action provision. Mullenix, *supra* note 131, at 12. The court remanded the action on other grounds, but analyzed the “bewildering” language of the mass action statute in lengthy dicta. See *Abrego Abrego*, 443 F.3d at 686-90. Providing more questions than answers, the court discussed many of the provisions that “make no sense.” See *id.* at 680 n.6, 686-90; Mullenix, *supra* note 131, at 12. The Northern District of Alabama discovered the same problem in *Lowery v. Honeywell International, Inc.*, 460 F. Supp. 2d 1288 (N.D. Ala. 2006). The court did not untie “this Gordian knot,” but found a lack of subject matter jurisdiction under section (d)(11)(b) because plaintiffs’ claims were less than the \$75,000 requirement of 28 U.S.C. § 1332(a). *Id.* at 1293-94.

The Chairman of the United States House Committee on the Judiciary, Representative F. James Sensenbrenner, inserted the House Sponsors' Statement into the congressional record when the House convened to vote on CAFA on February 17, 2005. The statement was not read on the floor of Congress in general debate prior to voting, but it was simply inserted into the record due to time constraints.<sup>134</sup> The statement aimed to "provide a brief summary of the provisions in Sections 4 and 5 of [CAFA]" and to "explain[] how the bill is to work . . . relative to the intent of the managers."<sup>135</sup> It read in part:

Overall, new section 1332(d) is intended to expand substantially Federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant. If a purported class action is removed under these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improper. And if a Federal court is uncertain about whether the \$5 million threshold is satisfied, the court should err in favor of exercising jurisdiction over the case.<sup>136</sup>

Congressman Sensenbrenner reiterated this position in the general debate prior to the vote. He stated,

The sponsors intend this subsection to be interpreted broadly, and if a purported class action is removed under this provision, the plaintiff shall bear the burden of demonstrating that the \$5 million threshold is not satisfied. By the same token, if a Federal court is uncertain about whether a case puts \$5 million or more in controversy, the court should favor exercising jurisdiction over the case.<sup>137</sup>

No Senators mentioned CAFA's burden of proof during the Senate's general debate. However, on February 28, 2005, ten days after CAFA's enactment, the Senate Judiciary Committee published its report on the Act, explaining CAFA's content and purpose. There were a few passages within the ninety-five-page report that also suggested that CAFA placed the burden of refuting diversity jurisdiction on the plaintiff resisting removal. The report read as follows:

If a purported class action is removed pursuant to these jurisdictional provisions, the named plaintiff(s) should bear the burden of demonstrating that the removal was improvident (i.e., that the applicable jurisdictional requirements are not satisfied). And if a federal court is uncertain about whether "all matters in controversy" in a purported class action "do not in the aggregate exceed the sum or value of \$5,000,000," the court should err in favor of exercising jurisdiction over the case.

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134. 151 Cong. Rec. H723, H727 (daily ed. Feb. 17, 2005).

135. *Id.*

136. *Id.*

137. 151 Cong. Rec. H730.

As noted above, it is the intent of the Committee that the named plaintiff(s) should bear the burden of demonstrating that a case should be remanded to state court (e.g., the burden of demonstrating that more than two-thirds of the proposed class members are citizens of the forum state). Allocating the burden in this manner is important to ensure that the named plaintiffs will not be able to evade federal jurisdiction with vague class definitions or other efforts to obscure the citizenship of class members.

....

... [I]f a plaintiff seeks to have a purported class action remanded for lack of federal diversity jurisdiction under subsection 1332(d)(5)(B) ("limited scope" class actions), that plaintiff should have the burden of demonstrating that "all matters in controversy" do not "in the aggregate exceed the sum or value of \$5,000,000, exclusive of interest and costs" or that "the number of all proposed plaintiff classes in the aggregate is less than 100."<sup>138</sup>

Both pieces of legislative history clearly state that, under CAFA, plaintiffs should bear the burden of proving that diversity jurisdiction is lacking. However, neither statement points to any language within CAFA to support the proposition, nor do they acknowledge that this standard would overturn long-standing precedent.

### *C. The Weight Given to CAFA's Legislative History May Determine the Burden Allocation*

A court facing the issue of which party should bear the burden of proving CAFA's diversity requirements must decide whether to follow the traditional rule in the absence of statutory language to the contrary, or to defer to CAFA's legislative history. But, in general, how reliable is legislative history, and is it enough to overturn well-established law? There has been a long-standing debate among legal academics, as well as current Supreme Court Justices, concerning the proper use of extrinsic sources in statutory interpretation. On one side of the table, led by Supreme Court Justice Antonin Scalia, are those who advocate a "textualist" or plain meaning approach.<sup>139</sup> Others, including Justice Stephen Breyer, endorse the consultation of extrinsic sources to reach the true purpose of a statute.<sup>140</sup> Part I.C of this Note discusses the opposing views on statutory interpretation, and concludes with an examination of the Supreme Court's recent treatment of legislative history, including the situation, as in CAFA, where the text is completely silent on the issue.

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138. Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 42-44, as reprinted in 2005 U.S.C.C.A.N. at 40-42 (quoting sections of CAFA).

139. See *infra* Part I.C.2.

140. See *infra* Part I.C.1.

### 1. Subjective Approaches: Intentionalism and Purposivism

The statutory system has drawbacks—drafters cannot address all possible situations and occasionally create textual ambiguities. Therefore, many legal theorists follow a mode of statutory interpretation that, rather than strictly applying the text, seeks to reach the legislative intent (“intentionalism”), or purpose (“purposivism”), behind a statute.<sup>141</sup> Advocates of this method argue that statutory language is often unclear, and therefore in order to apply a statute properly, a court must consult extrinsic sources, including legislative history, to determine how Congress meant the statute to be understood.<sup>142</sup> Naturally, some theorists use legislative history more liberally than others—some intentionalists will always consult legislative history, according more authority to clear congressional intent than clear statutory text, while others will only consult legislative history if the statutory text is ambiguous, ending their analysis if the statutory language is completely clear.<sup>143</sup> Regardless, there is a strong contingent of jurists, including Justice Breyer, who generally believe that statutory interpretation should begin with an examination of the text, but follow with “a second level of interpretive investigation” with use of extrinsic sources “to fully flesh out the statutory context.”<sup>144</sup>

The Supreme Court has a long history of consulting legislative history. In the 1892 case of *Church of the Holy Trinity v. United States*,<sup>145</sup> the Supreme Court overturned a long-standing rule that prohibited the use of

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141. See generally William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* 219, 228 (2d ed. 2006) (explaining intentionalism and purposivism). These theories can be classified further and differ on many levels, none of which are particularly relevant to this Note. See, e.g., Jeffrey Goldsworthy, *Moderate versus Strong Intentionalism: Knapp and Michaels Revisited*, 42 San Diego L. Rev. 669 (2005); John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70 (2006).

142. See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 847 (1991). Many sources of legislative history can be used to find congressional intent, including committee reports, sponsor statements, floor statements, rejected bills, statements by a non-legislative drafter, and subsequent history. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 637-40 (1990); see Christian E. Mammen, *Using Legislative History in American Statutory Interpretation* 61-75 (2002).

143. Compare Carlos E. Gonz  les, *Reinterpreting Statutory Interpretation*, 74 N.C. L. Rev. 585, 605-06 (1996) (discussing “law as legislative intent” intentionalism—under which theory, “where both the text of a statute and the enacting Congress’s intent are clear but contradict one another, the clear intent of the enacting Congress prevails”), and Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 Am. U. L. Rev. 277, 301-02 (1990) (stating that judges should always seek a statute’s intent because the text is rarely clear), with Breyer, *supra* note 142, at 848-61 (advocating the use of legislative history when a statute is unclear).

144. Mammen, *supra* note 142, at 169.

145. 143 U.S. 457 (1892).



legislative history to trump contrary statutory text.<sup>146</sup> Five years earlier, the Holy Trinity Church of New York contracted with an English minister to move to New York to become the church's rector and pastor.<sup>147</sup> The United States prosecuted the Holy Trinity Church in the Southern District of New York for this arrangement under the Alien Contract Labor Act of 1885, which made it unlawful to "assist or encourage the importation or migration of any . . . foreigner[], into the United States . . . under contract . . . to perform labor or service of any kind."<sup>148</sup> The Court found that the church's actions violated the text of the Act, but noted that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."<sup>149</sup> The Court consulted the Alien Contract Labor Act's legislative history, and reversed the conviction because it concluded that the statute was enacted to prevent the exploitation of cheap labor, which was not present in the case at bar.<sup>150</sup>

In *Holy Trinity*, the Court relied on several sources to interpret the Alien Contract Labor Act, but the congressional committee reports have been seen to have "provided the best support."<sup>151</sup> Equivalently, in a matter of statutory interpretation, the Court will often have multiple legislative sources at its disposal, yet the Court has consistently considered certain types of legislative history as far more influential than others.<sup>152</sup> The reports that accompany a bill to the floor of the House or Senate are the most frequently referenced type of legislative history.<sup>153</sup> Although these reports do not have the force of law,<sup>154</sup> the Court has found that when it chooses to consult a statute's legislative history, committee reports are the most reliable source of congressional intent.<sup>155</sup> Since the committee

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146. See *id.* at 459; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan. L. Rev. 1833, 1835, 1887-88 (1998) (discussing statutory interpretation before *Holy Trinity*).

147. *Holy Trinity*, 143 U.S. at 457-58.

148. *Id.* at 458.

149. *Id.* at 459.

150. See *id.* at 465 ("We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.").

151. See Vermeule, *supra* note 146, at 1842-44 (citing *Holy Trinity*, 143 U.S. at 462-65).

152. See Michael Sinclair, *Guide to Statutory Interpretation* 111-12 (2000) (listing many sources of legislative history and noting that "[n]o list of kinds of extrinsic resource should pretend to be exhaustive"); Eskridge, Frickey & Garrett, *supra* note 141, at 310-11 (discussing the "hierarchy of legislative history sources").

153. See Sinclair, *supra* note 152, at 112; Eskridge, Frickey & Garrett, *supra* note 141, at 311 ("Almost half the Supreme Court's references to legislative history are to committee reports . . .").

154. *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 345 n.7 (1994) (Stevens, J., dissenting) ("The purpose of a committee report is to provide the Members of Congress who have not taken part in the committee's deliberations with a summary of the provisions of the bill and the reasons for the committee's recommendation that the bill should become law. The report obviously does not have the force of law.").

155. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) ("[The Supreme Court] ha[s] repeatedly recognized that the authoritative source for legislative intent lies in the Committee

members are "in some sense advocates for the bill," typically the reports are reliably indicative of the statute's scope and content.<sup>156</sup> A committee report also carries strength in numbers. Justice Harlan stated in *Zuber v. Allen*,<sup>157</sup> that unlike the statement of a single legislator, "[a] committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."<sup>158</sup>

Although not as persuasive as committee reports, the Supreme Court has often consulted the bill sponsor's (the Congressman that proposed the bill) explanatory statements to Congress as reliable indicia of congressional intent.<sup>159</sup> These statements are deemed particularly credible because, like committee members, the sponsors are well apprised of the details of the bill. Since a misstatement by the sponsor may have political ramifications,<sup>160</sup> other Congressmen "pay special heed to their characterizations of the legislation."<sup>161</sup>

Outside of committee reports and sponsor statements, "the reliability of legislative history falls off markedly."<sup>162</sup> The Supreme Court has occasionally interpreted a statute with the aid of a statement by a single legislator during congressional debate, often referred to as a "floor statement,"<sup>163</sup> but the Court is generally wary of relying on the opinion of a

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Reports on the bill."); *Garcia v. United States*, 469 U.S. 70, 76 (1984) (stating that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill").

156. *Mammen*, *supra* note 142, at 62-63 (listing reasons why committee reports are more useful than other types of legislative history); *Sinclair*, *supra* note 152, at 112 ("Committees distill their expertise, investigations, internal debates, and resolutions in their reports.").

157. 396 U.S. 168 (1969).

158. *Id.* at 186.

159. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 584-88 (1988) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt." (internal quotation marks omitted)); *Bowsher v. Merck & Co.*, 460 U.S. 824, 832-33 (1983) (following the statements of the House sponsor to deduce congressional intent); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 525-27 (1982) (noting that the Senate sponsor's statement served as an "authoritative guide to the statute's construction").

160. *See Eskridge, Frickey & Garrett*, *supra* note 141, at 312-13 ("The speakers are motivated to be truthful because any overstatement may be seized upon by opponents or corrected by the speaker's allies. Moreover, if a sponsor misrepresents the deal in an important way, her reputation may suffer, and with it her effectiveness as a legislator.").

161. *Eskridge*, *supra* note 142, at 638.

162. *Eskridge, Frickey & Garrett*, *supra* note 141, at 313.

163. The Supreme Court has only utilized these statements in limited circumstances, such as when there is a consensus between floor statements, there are no other sources of legislative history available, or the statements support conclusions already discerned from the statute's text. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2767 n.10 (2006) ("We note that statements made by Senators preceding passage of the Act lend further support to what the text of the DTA and its drafting history already make plain."); *Reves v. Ernst & Young*, 507 U.S. 170, 182 (1993) (citing floor statements because the Congressmen consistently described a subsection of a statute in the same manner); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 267 (1991) ("Although the legislative history is not necessary to our conclusion that the Board members

single legislator as an authoritative statement of congressional intent.<sup>164</sup> Since statements uttered in congressional debate often conflict, and only represent the view of a single, perhaps uninformed, legislator on an isolated issue, relying on a floor statement poses a great risk of producing an inaccurate indication of true congressional intent.<sup>165</sup>

## 2. An Objective Approach: Textualism

The textualist approach to statutory interpretation draws a statute's meaning primarily from its language.<sup>166</sup> Adopting an objective approach, textualists believe that courts should simply "ascertain[] from the text the meaning 'most in accord with context and ordinary usage,'" rather than inferring the statute's meaning in light of its legislative history.<sup>167</sup> This method treats all forms of legislative history as of limited reliability, but often makes use of dictionaries, canons of construction, grammar books, or other reference sources to decipher the appropriate meaning of the statutory terms.<sup>168</sup>

Although textualists strongly discourage reliance on legislative history, many, like Justice Scalia, take a relatively flexible approach under certain circumstances. Justice Scalia has considered a statute's legislative history in the event of a drafter's error or when a strict application of the text would yield absurd results.<sup>169</sup>

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act in their official congressional capacities, the floor debates in the House confirm our view."); *see also* Mammen, *supra* note 142, at 69-70.

164. *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 224 (1980) ("The Court has often warned that in construing statutes, we should be extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws." (internal quotation marks omitted)).

165. *See* Mammen, *supra* note 142, at 68; Eskridge, Frickey & Garrett, *supra* note 141, at 313.

166. *See* Mammen, *supra* note 142, at 155 ("Textualism's central tenet is that the focus of statutory interpretation should be the statutory text that was duly enacted according to constitutional procedures."); Gregory E. Maggs, *Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia*, 28 Conn. L. Rev. 393, 396 (1996) ("[T]extualists consider the exact wording of a statute the primary basis for determining the statute's meaning.").

167. Maggs, *supra* note 166, at 396 (citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring)); Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351, 352 (1994).

168. *See* Eskridge, *supra* note 142, at 669 (describing reference materials consulted by textualists); *see also* *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 719 (1991) (Scalia, J., dissenting) (using a canon of construction to determine the meaning of the text); *Crandon v. United States*, 494 U.S. 152, 171-72 (1990) (Scalia, J., concurring) (consulting *Webster's Second New International Dictionary* to interpret statutory terms).

169. *See* *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) ("I have been willing, in the case of civil statutes, to acknowledge a doctrine of 'scrivener's error' that permits a court to give an unusual (though not unheard-of) meaning to a word which, if given its normal meaning, would produce an absurd and arguably unconstitutional result."); *see also* Mammen, *supra* note 142, at 158.

In his Supreme Court opinions, Justice Scalia has expounded three main arguments against the use of legislative history to ascertain congressional intent. First, he has contended that according authority to legislative history is unconstitutional. His argument is based on Article I, Section 7 of the U.S. Constitution, which provides that text only becomes law if it is bicamerally approved and signed by the President in the same textual form.<sup>170</sup> Scalia believes that courts should defer to this constitutionally mandated lawmaking process, and therefore all congressional statements absent from the text of the enacted statute should not be given the force of law or consulted as evidence of the law.<sup>171</sup> Second, Scalia has criticized the reliability of legislative history as an indicator of congressional intent. He has found it presumptuous to impute the views of a single committee to the majority of Congress,<sup>172</sup> especially since most statements go unread by the majority of Congress<sup>173</sup> and can often be attributed to the recommendations of a lobbyist to influence judicial construction, rather than providing a good-faith attempt to explain the statute's meaning.<sup>174</sup> Third, Scalia has disapproved of the judiciary's selective use of legislative history. He finds legislative history often to be a façade since a judge does not always have to

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170. See U.S. Const. art. I, § 7.

171. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring) ("All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that that text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law. . . . [W]e should try to give the text its fair meaning, whatever various committees might have had to say—thereby affirming the proposition that we are a Government of laws, not of committee reports. That is, at least, the way I prefer to proceed."); see also Eskridge, Frickey & Garrett, *supra* note 141, at 236.

172. *Mortier*, 501 U.S. at 620 (Scalia, J., concurring) ("[The Committee Report] does not necessarily say anything about what Congress as a whole thought. Assuming that all the members of the three Committees in question (as opposed to just the relevant Subcommittees) actually adverted to the interpretive point at issue here—which is probably an unrealistic assumption—and assuming further that they were in *unanimous* agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House.").

173. *Id.* ("It is most unlikely that many Members of either Chamber read the pertinent portions of the Committee Reports before voting on the bill—assuming (we cannot be sure) that the Reports were available before the vote."); *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring) ("I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and Senate Reports) . . .").

174. *Blanchard*, 489 U.S. at 98 (Scalia, J., concurring) ("As anyone familiar with modern-day drafting of congressional committee reports is well aware, the [referenced portion of the committee report] w[as] inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.").

follow a statute's legislative history, but, when favorable, many will "use it as a subterfuge to hide" the policy reasons for their decision.<sup>175</sup>

### 3. Statutory Interpretation by the U.S. Supreme Court

Justice Scalia's textualist practices have altered Supreme Court jurisprudence.<sup>176</sup> Before Justice Scalia's appointment to the Supreme Court in the mid 1980s, the Court routinely consulted legislative history in matters of statutory interpretation.<sup>177</sup> In *Train v. Colorado Public Interest Research Group, Inc.*, a pre-Scalia case, the Court even suggested that a Court of Appeals was in error for "exclud[ing] reference to the legislative history of [a statute] in discerning its meaning."<sup>178</sup> However, the Court has shifted to an objective approach in recent years.

For example, in *Exxon Mobil Corp. v. Allapattah*, the Supreme Court settled a split within the U.S. Courts of Appeals over the reach of supplemental jurisdiction in diversity actions and held that 28 U.S.C. § 1367 grants subject matter jurisdiction over a plaintiff in a multiparty action who fails to satisfy the amount-in-controversy requirement, as long as the other elements are present and at least one named plaintiff satisfies the amount in controversy.<sup>179</sup> The Court refused to follow the House Judiciary Committee Report on the Judicial Improvements Act, which suggested an alternative.<sup>180</sup> Speaking for the Court, Justice Kennedy explained that the Court does not consult legislative history in situations, such as in *Allapattah*, where the statute is not ambiguous.<sup>181</sup> He stated, "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on

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175. Mammen, *supra* note 142, at 164-65; see *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia, J., concurring) ("[The majority] serves to maintain the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent makeweight for decisions arrived at on other grounds."); *Mortier*, 501 U.S. at 617 (Scalia, J., concurring) ("[The lower court's] only mistake was failing to recognize how unreliable Committee Reports are—not only as a genuine indicator of congressional intent but as a safe predictor of judicial construction. We use them when it is convenient, and ignore them when it is not.").

176. Sinclair, *supra* note 152, at 109 ("At present, judicial practice [involving statutory interpretation] seems to be coalescing around a position somewhat like Justice Scalia's.").

177. *Id.* (noting that the Court had abandoned the plain meaning rule until it was revived by Justice Scalia); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 197-200 (1983) (noting that the Court consulted legislative history in nearly every case of the 1981 term involving a matter of statutory interpretation).

178. *Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976).

179. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2615 (2005); *supra* note 21 and accompanying text.

180. *Allapattah*, 125 S. Ct. at 2625.

181. *Id.* ("The proponents of the alternative view of § 1367 insist that the statute is at least ambiguous and that we should look to other interpretive tools . . . . We can reject this argument at the very outset simply because § 1367 is not ambiguous.").

the enacting Legislature's understanding of otherwise ambiguous terms."<sup>182</sup> Following a line of reasoning employed by Scalia in the past, Kennedy also stated that legislative history is unreliable because it can be "murky, ambiguous, and contradictory," and also gives "power . . . to strategic manipul[ators] . . . to secure results they were unable to achieve through the statutory text."<sup>183</sup>

As shown in *Allapattah*, the Supreme Court will rarely consult legislative history to interpret a statute unless its enacted text is ambiguous.<sup>184</sup> However, a new problem arises, as in CAFA's burden of proof, where the statute is completely silent. Some courts construe statutory silence on a particular issue as reflecting ambiguity within the text; other courts see it as reflecting congressional intent not to legislate on the subject at issue.<sup>185</sup>

In at least one instance, the pre-Scalia Supreme Court consulted a statute's legislative history when the statute was otherwise silent on a particular issue. In *Corning Glass Works v. Brennan*, the Court faced the question of whether Corning violated the Equal Pay Act by paying male night-shift workers a higher wage than female day-shift workers.<sup>186</sup> Prior to deciding the major issues on appeal, Justice Thurgood Marshall stated that "[a]lthough the Act is silent on [burden allocation], its legislative history makes plain that the Secretary [of Labor] has the burden of proof on this issue, as both of the courts below recognized."<sup>187</sup> The Court did not provide any additional analysis on the issue, but applied the burden accordingly.<sup>188</sup> However, it is not evident whether the Court truly deferred to the legislative history in light of statutory silence, considering that the Court also noted that this burden allocation was consistent with precedent under the Fair Labor Standards Act.<sup>189</sup>

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182. *Id.* at 2626.

183. *Id.*; see *supra* notes 172-74 and accompanying text.

184. For other examples of the Supreme Court refusing to consult legislative history when the statute is unambiguous, see *United States v. Gonzales*, 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then . . . judicial inquiry is complete." (internal quotation marks omitted)). But see *Zedner v. United States*, 126 S. Ct. 1976, 1985-86 (2006) (examining a statute's legislative history to confirm the decision that the Court had already reached on other grounds).

185. *Compare* *US Airways, Inc. v. Barnett*, 535 U.S. 391, 420-21 (2002) (Souter, J., dissenting) (construing statutory silence as ambiguity and subsequently consulting the legislative history), and *Comm'r of Internal Revenue v. Ewing*, 439 F.3d 1009, 1013 (9th Cir. 2006) ("The Tax Court correctly set forth the principle that, if the statute is ambiguous or silent, the court then may look to legislative history in order to determine congressional intent."), with *United States v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir. 1993) (claiming no authority to enforce principles within a statute's legislative history "[i]n the absence of any statutory provision addressing the issue").

186. *Corning Glass Works v. Brennan*, 417 U.S. 188, 194-95 (1974).

187. *Id.* at 195 (footnote omitted).

188. *Id.* at 196.

189. See *id.* at 196-97.

Twenty years later, the Supreme Court interpreted statutory silence as a clear showing that Congress chose not to legislate on the issue in question. In *Shannon v. United States*, the Supreme Court faced the issue of whether a federal district court is “required to instruct the jury regarding the consequences to the defendant of a verdict of ‘not guilty by reason of insanity’ . . . under the Insanity Defense Reform Act of 1984 [(IDRA)].”<sup>190</sup> Prior to the IDRA’s enactment, federal courts did not recognize a verdict of “not guilty by reason of insanity”—if a defendant established an insanity defense, the jury would simply find him “not guilty.”<sup>191</sup> In addition, prior to the IDRA, trial judges in the vast majority of federal circuits could not give jurors any information regarding what would happen to a defendant after an insanity acquittal—for example, whether the defendant would be permanently admitted for psychiatric treatment in a mental institution.<sup>192</sup> The IDRA did not provide any explicit directive as to whether a district judge should instruct jurors on the consequences of a “not guilty only by reason of insanity” verdict.<sup>193</sup> However, the IDRA’s Senate Committee Report endorsed the practice previously used by the U.S. Court of Appeals for the District of Columbia Circuit, which gave the judge discretion whether to instruct the jury on the effect of a “not guilty by reason of insanity” verdict.<sup>194</sup>

The Court ultimately ignored the legislative history and held that no instruction should be given to the jury as a matter of practice.<sup>195</sup> Writing for the Court, Justice Clarence Thomas noted that the Court has often disagreed over the role of legislative history in statutory interpretation, but that he was not aware of any case in which the Court has “given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute.”<sup>196</sup> Justice Thomas stressed that the text was completely silent as to the issue of jury instructions, and therefore, in order “[t]o give effect to this snippet of legislative history, [the Court] would have to abandon altogether the text of the statute as a guide in the interpretative process.”<sup>197</sup> Quoting the D.C. Circuit, the Court held that “courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point.”<sup>198</sup>

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190. *Shannon v. United States*, 512 U.S. 573, 575 (1994).

191. *Id.* at 575.

192. *Id.* at 576.

193. *Id.* at 580.

194. *Id.* at 583.

195. *Id.* at 587.

196. *Id.* at 583.

197. *Id.*

198. *Id.* at 584 (quoting *Int’l Bhd. of Elec. Workers, Local No. 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987) (alterations omitted)).

## II. COURTS DIFFER ON THE CAFA REMOVAL BURDEN

Considering the conflicting theories regarding statutory interpretation, it is not surprising that there has been some disagreement over whether CAFA's legislative history should be given effect absent any relevant statutory provision. Indeed, district courts initially split over whether CAFA places the burden of proving its diversity requirements on the proponent of remand. However, after Judge Frank Easterbrook of the Seventh Circuit weighed in on the issue in *Brill v. Countrywide Home Loans, Inc.*,<sup>199</sup> saying that more than "naked legislative history" is needed to overturn the long-standing burden precedent, courts have subsequently followed the Supreme Court's treatment of statutory silence in *Shannon* when analyzing CAFA and have placed the burden of proof on the proponent of remand.<sup>200</sup> Part II of this Note examines the federal court decisions that have ruled on this issue. Part II.A introduces the decisions that have placed the burden on the plaintiff to prove that removal is improper. Part II.B examines Judge Easterbrook's opinion in *Brill* and discusses its impact on other federal courts.

### A. District Courts Flip the Burden in Favor of Federal Jurisdiction

#### 1. Central District of California's First Stance: *Berry v. American Express Publishing Corp.*

In March 2005, a plaintiff filed a class action complaint in the Superior Court of California alleging that defendant American Express unlawfully charged cardholders for unsolicited magazine subscriptions in violation of several California state statutes.<sup>201</sup> Less than a month later, American Express took advantage of CAFA and filed a notice of removal in the District Court for the Central District of California.<sup>202</sup> The plaintiff then filed a motion for remand on the ground that the defendant could not show that the amount in controversy exceeded \$5,000,000.<sup>203</sup> The defendants claimed that recovery could exceed \$5,000,000 and, additionally, urged the court to follow the legislative history and "shift the burden to plaintiff to show that removal is improper."<sup>204</sup> The district court recognized that it was the first to rule on whether CAFA shifted the burden of proof to plaintiffs in order to favor federal jurisdiction.<sup>205</sup> It ultimately held that placing the

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199. 427 F.3d 446, 447 (7th Cir. 2005).

200. See *infra* Part II.B.2.

201. *Berry v. Am. Express Publ'g Corp.*, 381 F. Supp. 2d 1118, 1120 (C.D. Cal. 2005).

202. *Id.*

203. *Id.* The plaintiff argued that the requisite amount in controversy could not have been met since the class only sought injunctive relief and statutory damages for an amount far below \$5,000,000. *Id.* at 1120, 1123-24.

204. *Id.* at 1120.

205. *Id.* at 1121 ("[G]iven the recent enactment of the CAFA, the Court finds no cases, binding or otherwise, that speak directly to the questions presented.").



burden on the plaintiff was necessary to fulfill Congress's intent to broaden federal jurisdiction over class actions under CAFA.<sup>206</sup> In reaching this conclusion, the court relied heavily on the legislative history.<sup>207</sup> The court asserted that such a complex statute "cannot address all possible outcomes and situations," so a "faithful interpretation . . . involves more than the text itself."<sup>208</sup> Additionally, "disregard[ing] . . . the explicit and uncontradicted statements" within the legislative history would stray from the court's "role . . . to faithfully implement the law as intended by the Legislature."<sup>209</sup> The court opined that the failure to include an explicit directive on the burden of proof in the text of the statute did not demonstrate intent to maintain the status quo, but more plausibly, "reflect[ed] the Legislature's expectation that the clear statement in the Senate Report would be sufficient to shift the burden of proof."<sup>210</sup>

Although the court placed the burden on the plaintiff to show that federal jurisdiction was improper, that determination seems to have had little impact on its ultimate decision to grant the plaintiff's motion to remand.<sup>211</sup> The plaintiff sought only injunctive relief, and the court found that these "claims [were] so difficult to value that any monetary valuation could only be wholly speculative."<sup>212</sup> Since the court found no indication that the injunctive relief would create any considerable monetary value, let alone \$5,000,000, it seems that the court would have reached the same result even if it had placed the burden on the defendant.

## 2. District Courts and Legal Commentators Initially Follow *Berry*

Following the *Berry* decision in the Central District of California, many district courts similarly held that, under CAFA, plaintiffs bear the burden of refuting the district court's removal jurisdiction.<sup>213</sup> Each court ruled on similar grounds, holding that the statements in the Senate Committee

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206. *Id.* at 1122 ("Although the burden of proof is not addressed in either the text of the original or the text of the new statute, the CAFA was clearly enacted with the purpose of expanding federal jurisdiction over class actions.").

207. *Id.* at 1121 (labeling legislative history as an "essential tool" and an "important resource" when the statute does not squarely address the issue).

208. *Id.* at 1122.

209. *Id.*

210. *Id.* The original diversity statute did not contain a reference to the burden of proof either. The *Berry* court claimed that this carried little interpretative value. *Id.* at 1122-23.

211. *Id.* at 1123-24.

212. *Id.* at 1124. The court held that CAFA's amount-in-controversy requirement could be satisfied by the value of nonmonetary damages to the class members or the cost to the defendants. *Id.* at 1123. The court found no indication that the injunctive relief would have more than a nominal monetary effect on either party. *Id.* at 1124.

213. *See, e.g.,* Lussier v. Dollar Tree Stores, Inc., No. CV 05-768, 2005 WL 2211094 (D. Or. Sept. 8, 2005); Harvey v. Blockbuster Inc., 384 F. Supp. 2d 749 (D.N.J. 2005); Natale v. Pfizer Inc., 379 F. Supp. 2d 161 (D. Mass. 2005); Waitt v. Merck & Co., No. C05-0759L, 2005 WL 1799740 (W.D. Wash. July 27, 2005); *In re* Textainer P'ship Sec. Litig., No. C 05-0969, 2005 WL 1791559 (N.D. Cal. July 27, 2005); Yeroushalmi v. Blockbuster, Inc., No. CV 05-225, 2005 WL 2083008 (C.D. Cal. July 11, 2005).

Report express a clear intent to place the burden on the party opposing removal.<sup>214</sup>

Most notably, in July 2005, over a month after *Berry* was decided, Judge Lasnik of the Western District of Washington ruled on the issue in what he thought was a matter of first impression.<sup>215</sup> Although Judge Lasnik apparently was unaware of *Berry*, he used similar reasoning to conclude that CAFA placed the burden of proof on the plaintiff to disprove removal jurisdiction. Instead of simply relying on the face of the statute, the court put heavy emphasis on congressional intent, stating that in cases of “statutory construction, the Court’s task is to ‘interpret the words of the statute in light of the purposes Congress sought to serve.’”<sup>216</sup> The court discussed how Congress had a general intent to “permit federal courts to hear more interstate class actions and to relax the barriers facing defendants who seek to remove qualifying class actions to federal court.”<sup>217</sup> The court, therefore, found it easy to ignore the absence of language regarding burden shifting within CAFA, and chose to “divine Congressional intent from CAFA’s legislative history.”<sup>218</sup> Citing the Judiciary Committee’s Report, the court held that the plaintiff should bear the burden of demonstrating that CAFA’s jurisdictional requirements are unfulfilled.<sup>219</sup> The court found that the plaintiff had not met that burden because his brief did not specify the amount of economic damages incurred by the nationwide class.<sup>220</sup> Therefore, the court denied the plaintiff’s motion to remand.<sup>221</sup>

Additionally, in the fall of 2005, a group of legal commentators weighed in on the issue, asserting that CAFA had assigned the burden of persuasion to the party opposing jurisdiction.<sup>222</sup> The authors, like the *Berry* court, relied heavily on the statements within CAFA’s legislative history that suggest that the burden of proof should be placed on the proponent of remand.<sup>223</sup> However, unlike *Berry* and the other district courts that had

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214. See, e.g., *Harvey*, 384 F. Supp. 2d at 752 n.4 (“The Court—in view of the lack of case law addressing Section 1332(d)—will refer to the underlying Senate Report and Congressional Record for guidance.”); *In re Textainer*, 2005 WL 1791559, at \*3 (“[W]hile the defendant ordinarily bears the burden of proving that removal was proper, CAFA’s legislative history indicates that the plaintiff has the burden of proving that an action removed under CAFA should be remanded.” (citation omitted)).

215. *Waite*, 2005 WL 1799740, at \*1 (“Neither the Court nor the parties, as is evident from their briefing, could find published case law addressing this issue; the matter appears to be one of first impression in federal jurisprudence.”).

216. *Id.* (quoting *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983)).

217. *Id.*

218. *Id.* at \*2.

219. *Id.*

220. *Id.*

221. *Id.* at \*3.

222. H. Hunter Twiford III, Anthony Rollo & John T. Rouse, *CAFA’s New “Minimal Diversity” Standard for Interstate Class Actions Creates a Presumption that Jurisdiction Exists, with the Burden of Proof Assigned to the Party Opposing Jurisdiction*, 25 Miss. C. L. Rev. 7 (2005).

223. See *id.* at 16-20.

addressed the issue, the authors also claimed that the portions of CAFA's legislative history that discuss the burden of proof are "directly connected" to the "Findings and Purposes" section of the enacted text, and therefore should be given deference.<sup>224</sup> Moreover, they argued that even absent the "Findings and Purposes" portion of CAFA, the burden should still be placed on the proponent of remand because the "Supreme Court's well-established test to determine which party bears the burden of proof" directs the district court to consult a statute's legislative history whenever the statutory text is silent on the issue.<sup>225</sup>

### B. Other Circuit Courts Apply the Traditional Removal Burden to CAFA

Although several district courts agreed with the Central District of California's opinion in *Berry* and held that the proponent of remand carries the burden of proof in a CAFA removal proceeding, support for this position has dissipated after several circuit courts have held to the contrary. Part II.B discusses Judge Easterbrook's opinion in *Brill v. Countrywide Home Loans, Inc.*,<sup>226</sup> and its influence on other federal courts.

#### 1. Seventh Circuit—*Brill v. Countrywide Home Loans, Inc.*

In *Brill*, the plaintiff filed a class action suit in Cook County, Illinois, against Countrywide Home Loans alleging violations of the Telephone Consumer Protection Act (TCPA) as well as other state law violations.<sup>227</sup> The defendant removed the case to federal court, alleging that it fell within CAFA's new diversity statute, or in the alternative, that the TCPA claim created federal question jurisdiction under 28 U.S.C. § 1331(a).<sup>228</sup> The plaintiff contested removal and the Northern District of Illinois subsequently granted the plaintiff's motion for remand.<sup>229</sup> The district court held that the TCPA does not confer federal jurisdiction over private causes of action, and more relevant to this Note, the court found that the defendant did not meet its burden of establishing CAFA's jurisdictional requirements.<sup>230</sup> In doing so, the district court apparently ignored the controversy over which party bears the burden of proving the jurisdictional

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224. *Id.* at 57-60. Specifically, the authors rely on the passage in CAFA's text that states that one "purpose" of the Act is to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* (quoting Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2, 119 Stat. 4, 5 (to be codified at 28 U.S.C. 1711)).

225. *Id.* at 54-55 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), and *Grogan v. Garner*, 498 U.S. 279 (1991)). For a discussion of *Corning Glass Works*, see *supra* notes 186-89 and accompanying text.

226. 427 F.3d 446 (7th Cir. 2005).

227. *Brill v. Countrywide Home Loans, Inc.*, No. 05-C-2713, 2005 WL 2230193, at \*1 (N.D. Ill. Sept. 8, 2005).

228. *Id.* at \*1-2.

229. *Id.* at \*3.

230. *Id.* at \*1-2.

requirements under CAFA, and simply placed the burden on the defendant, citing case law in support of the pre-CAFA, common law rule.<sup>231</sup>

The defendant then took advantage of the new appellate opportunity created by CAFA and filed an interlocutory appeal to the Seventh Circuit under 28 U.S.C. § 1453(c)(1).<sup>232</sup> Writing for the court, Judge Easterbrook made a clear statement about CAFA's burden of proof.<sup>233</sup> Judge Easterbrook first noted the practicality of the common law rule. Using the case at bar as an example, he explained that the plaintiff typically lacks the pertinent information to calculate the amount in controversy,<sup>234</sup> and therefore the burden should be placed on the defendant in order to force the informed party to divulge the necessary information for the court to reach an accurate decision.<sup>235</sup>

Judge Easterbrook acknowledged the statement of the Senate Judiciary Committee<sup>236</sup> and decisions of district courts to the contrary, but concluded that more than "naked legislative history" is needed to alter the long-standing burden scheme.<sup>237</sup> He reasoned,

When a law sensibly could be read in multiple ways, legislative history may help a court understand which of these received the political branches' imprimatur. But when the legislative history stands by itself, as a naked expression of "intent" unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer. Thirteen Senators signed this report and five voted not to send the proposal to the floor. Another 82 Senators did not express themselves on the question; likewise 435 Members of the House and one President kept their silence.<sup>238</sup>

After addressing the burden issue, the court reversed the lower court on the merits of its decision that diversity jurisdiction pursuant to CAFA was lacking, finding that the defendant had shown a reasonable probability that the amount in controversy exceeded \$5,000,000.<sup>239</sup> The court then held that the TCPA does not confer exclusive jurisdiction upon state courts, and therefore did not preclude the defendant from removing the case pursuant to

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231. *Id.* at \*2 (citing *King v. Wal-Mart Stores*, 940 F. Supp. 213, 216 (S.D. Ind. 1996), to show that "the party seeking the federal forum has the burden of coming forward with competent proof to establish at least a reasonable probability that the amount in controversy requirement is satisfied.").

232. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 447 (7th Cir. 2005); *see supra* notes 123-27 and accompanying text.

233. *Id.* at 447-48.

234. *Id.* at 447 (noting that the plaintiff is in no position to show how many unsolicited faxes were sent without extensive discovery).

235. *Id.* at 447-48.

236. *See supra* note 138 and accompanying text.

237. *Brill*, 427 F.3d at 448.

238. *Id.*

239. *Id.* at 449.

CAFA or section 1441(a).<sup>240</sup> Therefore, the court found removal proper and remanded the case to the district court to be decided on the merits.<sup>241</sup>

## 2. The Seventh Circuit Decision Influences Subsequent Courts

The Seventh Circuit opinion in *Brill* has been highly influential precedent on this issue in other federal courts. Following similar logic, the majority of district courts that have addressed the issue after *Brill* have held that CAFA did not alter the traditional rule that the party that invokes federal jurisdiction and opposes remand bears the burden of proving that jurisdiction exists.<sup>242</sup> Although the position of the *Berry* court initially gained support,<sup>243</sup> after Judge Easterbook's decision in *Brill*, it appears that, as of the time of this writing, only one court has found that the named plaintiff should bear the burden of showing that diversity jurisdiction is lacking. In *Dinkel v. General Motors Corp.*, the District Court for the District of Maine denied the plaintiff's motion to remand after rejecting the plaintiff's argument that the action commenced prior to CAFA's enactment, and therefore should be governed by the pre-CAFA diversity requirements.<sup>244</sup> In dicta, citing *Berry*, the court stated that, according to the Senate Judiciary Committee Report, plaintiff "should bear the burden of

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240. *Id.* at 450-51.

241. *Id.* at 452.

242. *Moniz v. Bayer*, 447 F. Supp. 2d 31, 34 (D. Mass. 2006) ("[T]he clear majority of courts that have addressed the issue have held that, even where CAFA applies, the burden of proof on a motion to remand remains with the removing party because the text of the statute says nothing about changing that long-standing rule."); *see, e.g.*, *Prime Care of N.E. Kan., LLC v. Blue Cross and Blue Shield of Kan.*, No. 05-2227, 2006 WL 2734469 (D. Kan. Sept. 25, 2006); *Morgan v. Gay*, No. 06-1371, 2006 WL 2265302 (D.N.J. Aug. 7, 2006); *Tiffany v. Hometown Buffet, Inc.*, No. C 06-2524, 2006 WL 1749557 (N.D. Cal. June 22, 2006); *Eufaula Drugs, Inc. v. TDI Managed Care Servs., Inc.*, No. 2:05-CV-293, 2006 WL 986976 (M.D. Ala. Apr. 14, 2006); *Adams v. Ins. Co. of N. Am.*, 426 F. Supp. 2d 356 (S.D. W. Va. 2006); *Werner v. KPMG LLP*, 415 F. Supp. 2d 688 (S.D. Tex. 2006); *Rodgers v. Cent. Locating Serv., Ltd.*, 412 F. Supp. 2d 1171 (W.D. Wash. 2006); *Ongstad v. Piper Jaffray & Co.*, 407 F. Supp. 2d 1085 (D.N.D. 2006).

243. *See supra* Part II.A.2.

244. *Dinkel v. Gen. Motors Corp.*, 400 F. Supp. 2d 289 (D. Me. 2005). The plaintiff filed his class action complaint in Kansas state court on February 17, 2005, one day before the enactment of CAFA. *Id.* at 291. He subsequently served the complaint in a timely manner on most defendants in April 2005, but did not serve others until June 2005. *Id.* The new diversity jurisdiction under CAFA does not apply if the action commences prior to its enactment on February 18, 2005. However, under Kansas law, an action officially commences on the filing date only if process is served on all defendants within ninety days. *Id.* at 292. The defendants who were served more than ninety days after the complaint was filed removed the case to federal court, claiming that diversity jurisdiction existed under CAFA. *Id.* at 291. The plaintiff then voluntarily dismissed these defendants without prejudice in an apparent attempt to avoid federal jurisdiction. *Id.* The Judicial Panel on Multidistrict Litigation transferred the case to the District of Maine, where the court eventually denied the plaintiff's motion to remand because when a removing defendant no longer needs consent of the other parties to remove, "the entire lawsuit . . . is removed, not merely the claims against that defendant." *Id.* at 292, 294. The plaintiff "cannot now 'unring the bell' by dismissing the Removal Defendants." *Id.* at 294.

demonstrating that the removal was improvident.”<sup>245</sup> The District of Maine decided *Dinkel* only about three weeks after the Seventh Circuit decided *Brill*, and did not mention Judge Easterbrook’s opinion as contrary authority.

Besides this brief piece of dicta from the *Dinkel* court, the Seventh Circuit’s opinion in *Brill* seems to have ended the developing split of authority in the federal courts. The Second, Third, Ninth, and Eleventh Circuits have all since joined the Seventh Circuit in holding that CAFA did not alter the common law rule of burden of proof on the proponent of federal jurisdiction.<sup>246</sup> In fact, the Ninth Circuit’s treatment of the issue effectively overruled *Berry*, and indeed, the Central District of California complied by placing the burden of proof on the proponent of removal in a subsequent case.<sup>247</sup>

Each circuit relied on reasoning largely similar to that of Judge Easterbrook to conclude that the burden of proving CAFA’s diversity requirements should remain on the removing party.<sup>248</sup> Therefore, rather than examining each opinion, the remaining portion of Part II discusses just the Ninth and Eleventh Circuit opinions. Both courts thoroughly expand upon Judge Easterbrook’s arguments and apply the burden under slightly different circumstances. Part II.B.2.a discusses *Abrego Abrego v. Dow Chemical Co.*, in which the Ninth Circuit places the burden on the removing party to prove the existence of CAFA’s “mass action” jurisdictional requirements. Part II.B.2.b examines *Evans v. Walter Industries Inc.* and *Miedema v. Maytag Corp.*, which, read together, place the initial burden of proof on the moving party, but place a secondary burden on the nonmoving party to establish a statutory exception to subject matter jurisdiction.

a. *Ninth Circuit Applies the Traditional Burden in a “Mass Action”*—  
*Abrego Abrego v. Dow Chemical Co.*

In April 2005, over one thousand Panamanian banana plantation workers filed suit in state court against multiple defendants, alleging injuries

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245. *Id.* at 295.

246. See *Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2006); *DiTolla v. Doral Dental IPA of N.Y., LLC*, 469 F.3d 271 (2d Cir. 2006); *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 678 (9th Cir. 2006) (*per curiam*).

247. See *Lao v. Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1049 (C.D. Cal. 2006) (“Insofar as the amount in controversy requirement contained in CAFA is concerned, the Ninth Circuit has already held that it is the removing party, that is, defendants, who bear the burden of proof.” (citing *Abrego Abrego*, 443 F.3d at 685)).

248. See, e.g., *Blockbuster Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (citing *Brill* and concluding that “[i]n the absence of a clear textual directive to alter such a long established principle of federal jurisdiction, [the court should] decline to do so”); *Morgan*, 471 F.3d at 473 (citing Judge Frank Easterbrook for the proposition that a “problem with relying solely on CAFA’s legislative history is that the portion that supports burden-shifting does not concern any text in the bill that eventually became law” (internal quotation marks omitted)).

resulting from continued exposure to a chemical pesticide known as DBCP.<sup>249</sup> The plaintiffs alleged that the defendants, including Dow Chemical, used DBCP on plantations even after the U.S. Environmental Protection Agency restricted the use of DBCP in the United States in 1979.<sup>250</sup> The case was not filed as a state class action, but was to be tried jointly on the ground that each plaintiff's claims involved common questions of law or fact.<sup>251</sup> Dow Chemical then filed a notice of removal in the Central District of California attempting to invoke CAFA's "mass action"<sup>252</sup> provision.<sup>253</sup> After the district court concluded that it lacked subject matter jurisdiction over the case because Dow Chemical had failed to meet its burden of proving the requisite "mass action" provisions, Dow Chemical appealed to the Ninth Circuit arguing, *inter alia*, that plaintiffs bear the burden of refuting removal jurisdiction under CAFA.<sup>254</sup>

The Ninth Circuit took an objective approach on the burden issue similar to that of the Seventh Circuit. The court cited *Brill*, noting that its sister court had rejected the same argument because there is no language in CAFA to support it.<sup>255</sup> The court acknowledged that consulting legislative history is a valuable tool of statutory interpretation, but only when the plain language of the statute is ambiguous.<sup>256</sup> As to CAFA's burden issue, and other instances of statutory silence, the court "presume[s] that Congress is aware of the legal context in which it is legislating."<sup>257</sup>

The Ninth Circuit found that the ordinary presumption of congressional awareness was strengthened because the rule that the removing defendant bears the burden of establishing jurisdiction was so long-standing that it is "near-canonical."<sup>258</sup> In addition, the court pointed out that CAFA contained many significant modifications of federal precedent, both statutory and judge-made; the decision explicitly to reverse certain established principles of federal subject matter jurisdiction, and not others, shows Congress's detailed understanding of the existing law and strengthens the presumption that Congress was fully aware of the pertinent law in the area in which it was legislating.<sup>259</sup> Therefore, the court concluded that the common law rule should be enforced because Congress, by not explicitly addressing the burden issue within the text of the statute,

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249. See *Abrego Abrego*, 443 F.3d at 678.

250. *Id.*

251. See *id.*; Mullenix, *supra* note 131, at 12.

252. See *supra* notes 128-33 and accompanying text.

253. *Abrego Abrego*, 443 F.3d at 678.

254. *Id.* at 678-79.

255. *Id.* at 683.

256. *Id.*

257. *Id.* at 684.

258. *Id.*

259. See *id.*

could expect that CAFA would be applied in conjunction with the existing rule to place the burden on the moving party.<sup>260</sup>

The court acknowledged that CAFA's provisions broadened federal jurisdiction over certain types of class actions. However, the court was not convinced that a general legislative intent to broaden the federal judiciary's ability to adjudicate class actions overrules every common law principle that previously impeded removal. Instead, the court "conclude[d] that . . . Congress carefully inserted into the legislation the changes it intended and did not mean otherwise to alter the jurisdictional terrain."<sup>261</sup>

b. *Eleventh Circuit Refines the Standard for CAFA's Statutory Exceptions*—*Evans v. Walter Industries, Inc.* and *Miedema v. Maytag Corp.*

The Eleventh Circuit first addressed the issue of which party should bear the burden of proving CAFA's jurisdictional requirements in a remand action in *Evans v. Walter Industries, Inc.*<sup>262</sup> In *Evans*, the plaintiffs filed a class action complaint in the Circuit Court of Calhoun County, Alabama, alleging property damage arising from the defendants' release of waste over a period of eighty-five years.<sup>263</sup> Four defendants removed the case to federal court, and the plaintiffs promptly moved to remand, arguing that the case fell within CAFA's local controversy exception.<sup>264</sup> The district court held that the case did fall within the local controversy exception, and therefore remanded the case to the state court; the defendants appealed.<sup>265</sup>

The court's discussion of the issue was limited. Citing *Brill*, the court simply stated, without any further analysis, that "CAFA does not change the traditional rule that the party seeking to remove the case to federal court bears the burden of establishing federal jurisdiction."<sup>266</sup> However, the court still faced the dispute over which party should bear the burden of establishing the local controversy exception after CAFA's basic requirements for removal to federal court already had been fulfilled. Neither *Brill* nor *Abrego Abrego* involved a removing defendant that fulfilled its burden of proving CAFA's preliminary jurisdictional requirements, so the *Evans* court faced a question of first impression.<sup>267</sup>

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260. See *id.* ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them." (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-99 (1979))).

261. *Id.* at 684-85.

262. 449 F.3d 1159 (11th Cir. 2006).

263. *Id.* at 1161.

264. *Id.*; see *supra* notes 113-15 and accompanying text.

265. *Evans*, 449 F.3d at 1161.

266. *Id.* at 1164.

267. See *id.* at 1165 ("No other Circuit appears to have addressed the specific question of which party should bear the burden of proof on CAFA's local controversy exception. . . . Thus, we address as a question of first impression the issue of who bears the burden of proving the local controversy exception, once the removing defendants have proved the



The court followed the pre-CAFA, common law rule that “when a party seeks to avail itself of an express statutory exception to federal jurisdiction . . . the party seeking remand bears the burden of proof with regard to that exception.”<sup>268</sup> Therefore, the court held that “plaintiffs bear the burden of proving the local controversy exception to the jurisdiction otherwise established.”<sup>269</sup> Subsequently, the court found that the plaintiffs had not fulfilled the burden of proving that their case should be heard in state court under the local controversy exception and therefore reversed the decision of the district court.<sup>270</sup>

In *Miedema v. Maytag Corp.*,<sup>271</sup> the Eleventh Circuit expanded on *Evans* and held that CAFA did not alter the traditional rule that the moving party bears the burden of proving subject matter jurisdiction. In October 2005, plaintiff filed a class action complaint in a Florida state court, alleging defects in various appliances manufactured by the defendant.<sup>272</sup> The defendant quickly removed the case to the Southern District of Florida, under CAFA, claiming that the parties were diverse and the case involved over 100 plaintiffs for an aggregate amount in controversy over \$5,000,000.<sup>273</sup> The District Court for the Southern District of Florida granted the plaintiff's subsequent motion to remand, finding that in the face of uncertainty over the true amount in controversy, it must resolve all doubt in favor of remand.<sup>274</sup> The defendant appealed to the Eleventh Circuit, arguing, *inter alia*, that CAFA's “legislative history expresses a clear intent to require that an objecting plaintiff demonstrate removal was improvident, i.e., that all applicable jurisdictional requirements were *not* met.”<sup>275</sup>

The court quickly rejected this argument. First, the court cited *Brill, Abrego Abrego*, and its own jurisprudence in *Evans*, to support this stance.<sup>276</sup> The court then explained that the plaintiff's argument was flawed because (as similarly stated by the Supreme Court in *Allapattah*<sup>277</sup>) legislative history can be used only to interpret ambiguous statutory language.<sup>278</sup> Hence, the court claimed “no authority” to adopt plaintiff's

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amount in controversy and the minimal diversity requirement, and thus have established federal court jurisdiction under § 1332(d)(2).”).

268. *Id.* at 1164 (quoting *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003)); *see supra* note 35 and accompanying text.

269. *Evans*, 449 F.3d at 1165.

270. *See id.* at 1166-68.

271. 450 F.3d 1322 (11th Cir. 2006).

272. *Id.* at 1324.

273. *Id.* at 1325.

274. *Id.*

275. *Id.* at 1327.

276. *Id.* at 1328.

277. *See supra* notes 181-83 and accompanying text.

278. *See id.* (“[T]his Circuit previously explained that [w]hile a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an independent statutory source having the force of law.” (internal quotation marks and emphasis omitted)).

position and thereby “enforce principles gleaned *solely* from legislative history that has no statutory reference point.”<sup>279</sup>

The court acknowledged that Congress clearly intended to expand federal jurisdiction, but refused to accept that a general intent to facilitate removal of class actions to federal courts effectively overruled every common-law principle that favors the plaintiff on a motion to remand. The court reasoned that since CAFA overruled particular aspects of established common law and kept others intact, clearly Congress knew of the existing law, and if it wished to change the burden of proof, it would have stated so within the text of CAFA.<sup>280</sup> The court also cast doubt on the efficiency of the plaintiff’s proposed standard, writing in a footnote,

Notably, the standards urged by Maytag would leave courts with lingering doubts about the existence of subject matter jurisdiction. The mere fact that a plaintiff failed to prove that subject matter jurisdiction did *not* exist, for example, would not necessarily mean that subject matter jurisdiction *did* exist. As a result, class actions could conceivably proceed through removal, an initial 28 U.S.C. § 1453(c) appeal, discovery, and perhaps even summary judgment or trial before it became apparent that subject matter jurisdiction was in fact lacking. Such a result is difficult to reconcile with CAFA’s apparent concern for the swift resolution of disputes over federal jurisdiction, as evidenced by the 7-day and 60-day deadlines imposed by § 1453(c).<sup>281</sup>

After concluding that the burden was correctly placed on Maytag by the district court, the *Miedema* court found that there was still “great uncertainty” over the amount in controversy.<sup>282</sup> The court therefore affirmed the trial court’s decision to remand the case to state court.<sup>283</sup>

### III. CAFA DID NOT SHIFT THE BURDEN OF PROOF ON A MOTION TO REMAND TO THE PLAINTIFFS

Part III.A of this Note argues that, under Supreme Court precedent, the statements from CAFA’s legislative history that direct federal judges to place the burden on the plaintiff during a motion to remand do not carry the force of law. Part III.B posits that providing authority to legislative history with no statutory reference point would create a means for interested parties to undermine the lawmaking process. Part III.C argues that the burden of

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279. *Id.* (internal quotation marks omitted). In a similar vein, the court rejected defendant’s argument that any doubts over the amount in controversy should be resolved in favor of finding jurisdiction. *Id.* at 1328-29. The court found the statements in CAFA’s legislative history insufficient, standing alone, to justify departure from the well-established rule of construing the removal statutes strictly and erring on the side of remand. *Id.*

280. *See id.* at 1329 (“While the text of CAFA plainly expands federal jurisdiction over class actions and facilitates their removal, we presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so.” (internal quotation marks omitted)).

281. *Id.* at 1330 n.8.

282. *Id.* at 1332.

283. *Id.*

proving CAFA's diversity requirements should remain on the proponent of federal jurisdiction to constrain properly the limited power given to federal courts and promote judicial efficiency. For these reasons, federal courts should follow the U.S. Courts of Appeals and place the burden of proving CAFA's diversity requirements on the proponent of federal jurisdiction.

A. *'Naked' Legislative History Is Not Enough to Switch the Burden of Proof*

It is a "near-canonical" rule that the proponent of federal jurisdiction bears the burden of proving the existence of subject matter jurisdiction,<sup>284</sup> and CAFA does not address the burden issue within its statutory text.<sup>285</sup> However, the almost identical statements within the Senate Judiciary Committee Report and the House Sponsor's Statement clearly suggest that, under CAFA, the burden should be placed on the proponent of remand to demonstrate that removal was improper.<sup>286</sup> Several district courts have accorded too much authority to these congressional statements and placed the burden of proving CAFA's diversity requirements after removal on the plaintiff.<sup>287</sup> However, since Judge Easterbrook's decision in *Brill*, the vast majority of courts have held that CAFA did not affect the long-standing rule that the proponent of federal jurisdiction bears the burden of establishing the diversity requirements.<sup>288</sup>

Considering its recent decisions, the U.S. Supreme Court would most likely agree with the U.S. Courts of Appeals that have ruled on the issue. Despite its frequent practice of consulting legislative history, the Supreme Court has recently used a more objective approach to statutory interpretation, requiring ambiguity within the statutory text before the legislative history can be consulted.<sup>289</sup> Some intentionalists have argued that if a statute's legislative history addresses an issue that has no textual reference point, then the statute is ambiguous, and the court should consult the legislative history to glean congressional intent.<sup>290</sup> In fact, a group of commentators have interpreted *Corning Glass Works v. Brennan* to allow the district court to consult the legislative history to discern a statute's burden of proof when the enacted text is silent on the issue.<sup>291</sup> Their analysis is misguided. The Court in *Brennan* never established a clear standard—it never explained the reasoning behind its method of statutory interpretation and also relied in part on the burden allocation of similar statutes.<sup>292</sup> On the other hand, in *Shannon v. United States*, the court

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284. See *supra* notes 30-35, 258 and accompanying text.

285. See *supra* Part I.B.2.d.

286. See *supra* notes 136-38 and accompanying text.

287. See *supra* Part II.A.

288. See *supra* Part II.B.2.

289. See *supra* notes 177-83 and accompanying text.

290. See *supra* note 185 and accompanying text.

291. See *supra* notes 222-25 and accompanying text.

292. See *supra* note 189 and accompanying text.

unambiguously stated that legislative history should not be accorded any authority when it is unconnected to enacted text.<sup>293</sup> The Court refused to impose certain principles from the IDRA's legislative history, stating that "courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point."<sup>294</sup> The Court acknowledged the ongoing debate between jurists regarding the proper use of legislative history in statutory interpretation, but opined that neither group could reasonably accord authority to the legislative history in this type of situation because it would eliminate the importance of the enacted statutory text "as a guide in the interpretative process."<sup>295</sup> Since the circumstances in *Shannon* were nearly identical to CAFA's burden issue, there is no reason to believe that the Court would depart from this reasoning and defer to the statements within CAFA's legislative history.

With CAFA, Congress clearly intended to eliminate many of the impediments that allowed plaintiffs' attorneys to keep large class actions in the more favorable state courts.<sup>296</sup> It expanded diversity jurisdiction over class actions and did away with many of the restrictions on removal.<sup>297</sup> Placing the burden of proving CAFA's diversity requirements on the plaintiff during a motion to remand would also broaden federal jurisdiction, although minimally. When the class size or amount in controversy is ambiguous, a class action would remain in federal court until plaintiffs could make an affirmative showing that removal was improvident.

However, it is assumed that Congress is aware of the pertinent law in the area that it is legislating.<sup>298</sup> It can choose to overrule some principles and leave others untouched to reach a desired end. Likewise, CAFA's general intent to facilitate removal should not effectively overrule every common law principle (e.g., the burden of proving diversity jurisdiction) that favors a defendant on a motion to remand. Considering CAFA's broad expansion of class action diversity jurisdiction and relaxation of the removal requirements, it is unnecessary to switch the burden to the proponent of remand in order to accomplish CAFA's "purpose" of eliminating abuses through the federalization of interstate class actions. In fact, commentators have noticed that the changes made to federal procedure by CAFA's statutory text were adequate to accomplish the goal of broadening federal jurisdiction over class actions.<sup>299</sup> Such thorough reformation of class action

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293. See *supra* notes 195-98 and accompanying text.

294. *Shannon v. United States*, 512 U.S. 573, 584 (1994); see *supra* note 198 and accompanying text.

295. *Shannon*, 515 U.S. at 583; see *supra* note 197 and accompanying text.

296. See *supra* notes 69-74, 101-33 and accompanying text.

297. See *supra* Part I.B.2.a-b.

298. See *supra* note 257 and accompanying text.

299. See Peter Geier, *CAFA a Year Later? Not So Bad: Plaintiffs' Fears of Tort Reform Fading*, Nat'l L.J., Mar. 6, 2006, at 1 (finding that CAFA has been relatively successful at bringing more class actions into federal court and shutting down "magnet courts").

procedure evidences that Congress thoughtfully put to text the changes that it intended to make and intentionally omitted mention of all other issues.

*B. Providing Authority to Statements Within a Statute's Legislative History with No Textual Reference Point Would Undermine Congress's Lawmaking Function*

Typically, committee reports and sponsors' statements have been treated as the most reliable indicia of congressional intent.<sup>300</sup> With nearly identical statements within the Senate Judiciary Committee Report and the House Sponsors' Statements, many intentionalists would surely conclude that at least some members of Congress intended to place the burden of proving CAFA's diversity requirements on the plaintiff during a motion to remand.<sup>301</sup> However, Justice Scalia has frequently argued that legislative history is wholly unreliable because statements often are inserted at the request of lobbyists or other interested parties to manipulate judicial construction.<sup>302</sup> This argument does not seem very compelling when a judge chooses to consult legislative history to glean the meaning of an ambiguous portion of the statutory text. It seems unlikely that an interested party would seek to insert biased statements into the legislative history to affect the judicial interpretation of a portion of the statutory text that has yet to be deemed ambiguous by the judiciary. Such efforts would be highly speculative and limited to manipulating the reading of the already enacted statutory language. It could not introduce new elements that are not addressed in the enacted text, e.g., the burden of proving CAFA's diversity requirements.

On the other hand, Scalia's argument seems particularly relevant if judges were to provide authority to statements within the legislative history as if they had the force of law. If a legislator cannot find support on a particular issue related to the legislation at hand, he could attempt to insert statements into a committee report that purport to reflect congressional intent, but actually promote his failed legislation. Indeed, Justice Scalia has noted that committee reports are not always drafted carefully to reflect true congressional intent, but statements are often inserted "at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist."<sup>303</sup>

Therefore, it is worth noting that many have perceived the push for class action reform, including CAFA, as a political maneuver designed to reduce the legal liability of large corporations.<sup>304</sup> Obviously, business lobbyists had incentive to encourage legislators to broaden federal jurisdiction over class actions as widely as possible. Congress suggested that federal courts

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300. See *supra* notes 152-65 and accompanying text.

301. See *supra* notes 136-38 and accompanying text.

302. See *supra* notes 172-74 and accompanying text.

303. *Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring).

304. See *supra* notes 44-46 and accompanying text.

are less likely to certify classes, which limits potential liability.<sup>305</sup> There is no evidence that a Congressman disingenuously inserted the statements regarding CAFA's burden of proof at the request of political forces, but a situation in which the statement is unconnected to any statutory text presents the greatest risk of abuse. When legislative history is unconnected to the statutory text, however, it is likely impossible to determine if statements were inserted for a proper purpose. Hypothetically, even if the pertinent portions of CAFA's legislative history were written in good faith and the drafters did intend to place the burden of proof on the class plaintiffs, gleaning law solely from the legislative history would set meaningful precedent and therefore create an incentive for dishonest politicians to hide statements within a bill's legislative history in the future. This would create an unreliable standard in which legislative history holds as much authority as the enacted statutory text. It would undermine the constitutionally mandated lawmaking process and provide private interests a viable method to manipulate the law.

*C. Placing the Burden of Proof on the Nonmoving Party Would Not Promote Judicial Efficiency*

Unlike state courts, federal courts have limited power to adjudicate disputes.<sup>306</sup> Since federal courts may hear only the types of cases spelled out in Article III and further authorized by a statutory grant of Congress, federal courts have taken caution not to hear cases outside of these limits and infringe upon the power left to the states.<sup>307</sup> Federal courts have used burden allocation accordingly. Whether the case is originally filed in federal court or removed from the state system, placing the initial burden of proving subject matter jurisdiction on the proponent of the federal forum forces an affirmative showing of jurisdiction in order to proceed.<sup>308</sup>

Congress can prioritize judicial resources to fit current needs and amend the limits of federal subject matter jurisdiction as necessary.<sup>309</sup> This can be seen in the transformation of diversity jurisdiction over the years. It originally carried a \$500 amount-in-controversy requirement, but Congress has periodically increased the requirement (currently at \$75,000) when monetary inflation imposed a need to limit federal jurisdiction further.<sup>310</sup> CAFA was enacted along the same lines. Finding class action abuses in the state system, Congress broadened federal jurisdiction over large class actions to help alleviate the problem.<sup>311</sup> However, when Congress decides to broaden or narrow federal jurisdiction, it changes only the range of

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305. See *supra* notes 52-53, 87 and accompanying text.

306. See *supra* notes 9-10 and accompanying text.

307. See *supra* note 30 and accompanying text.

308. See *supra* notes 32-33 and accompanying text.

309. See *supra* note 13 and accompanying text.

310. See *supra* notes 15, 17, 19 and accompanying text.

311. See *supra* Part I.B.1, 2.b.

disputes that the federal system can properly adjudicate. It does not alter the fundamental tenet that federal courts are limited, and hearing a case outside of those imposed limits still amounts to an unconstitutional violation of the states' right to settle disputes.

Moreover, it would be a waste of judicial resources if Congress were to amend CAFA to include a statutory provision that directs a court deciding a motion to remand to place the burden on the plaintiff to show that jurisdiction is absent. It would certainly not affect all cases.<sup>312</sup> However, the burden allocation would have a substantial effect on cases where the class size or amount in controversy is very close to CAFA's thresholds for diversity jurisdiction. If the burden were on the nonmoving party, a situation in which a party fails to prove that subject matter jurisdiction does not exist would not necessarily indicate that subject matter jurisdiction does exist. Therefore, complicated class action suits in which the potential class size or the amount in controversy is not immediately apparent may be swept into federal court only to discover later in the process (possibly during trial) that subject matter jurisdiction may be lacking. This leads to a clear waste of judicial resources; the court would be forced to rehash the same jurisdictional issue to ensure that it is not hearing a case outside of its jurisdictional bounds. This system would also impose unnecessary delay on these cases, which does not coincide with CAFA's stated purpose of ensuring the "fair and prompt" resolution of class actions.<sup>313</sup> Overall, the process would be more efficient if the court continued to place the initial burden on the proponent of the federal forum to make an affirmative showing of diversity jurisdiction in order to proceed.

### CONCLUSION

District courts should follow the opinions of the Second, Third, Seventh, Ninth, and Eleventh Circuits and continue to place the initial burden of proving CAFA's diversity requirements on the proponent of the federal forum. CAFA was enacted with a clear intent to broaden the federal judiciary's ability to adjudicate large class actions. However, a general intent to facilitate removal coupled with "naked" legislative history is not enough to overturn the "near-canonical" rule that the proponent of federal jurisdiction bears the burden of proving the existence of subject matter jurisdiction. The Supreme Court has clearly stated that principles taken from the legislative history without any link to the statutory text are to be given no authority. If courts hold otherwise, they will be wasting judicial

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312. For example, in *Berry v. American Express Publishing Corp.*, the court chose to place the burden of proof on the plaintiff, but that determination did not affect the ultimate decision on the motion to remand since the court concluded that the potential monetary value of the requested injunctive relief was completely speculative. See *supra* notes 206, 212 and accompanying text.

313. See *supra* note 47.

resources and enabling interested parties to undermine the constitutionally mandated lawmaking process.